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In the Supreme Court of the United States

OCTOBER TERM
1940.

No. 832

STATE OF OKLAHOMA ex rel. LEON C. PHILLIPS,
Governor of the State of Oklahoma, *Appellant*,

vs.

GUY F. ATKINSON COMPANY, a Corporation Under
the Laws of the State of Nevada, CLEON A. SUM-
MERS, United States District Attorney for the
Eastern District of Oklahoma, and CURTIS P.
HARRIS, Special Attorney, Department of Justice
of the United States, *Appellees*.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT
COURT, FOR THE EASTERN DISTRICT OF OKLAHOMA.

Brief for Appellant

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INDEX

OPINION BELOW	2
JURISDICTION	3
QUESTIONS PRESENTED	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
SPECIFICATION OF ERRORS	16

ARGUMENT

Point I.

Appellant has the standing to maintain a suit to enjoin the illegal and unconstitutional acts of appellees and thereby test the legality and constitutionality of the Acts of Congress under which they claim to act.	17
--	----

Point II.

Appellant as parens patriae has a right to maintain this suit.	21
---	----

Point III.

The Denison Reservoir is a multiple purpose project on a non-navigable stream wholly within Appellant's domain, combining two functionally and physically separate and unrelated purposes.	23
Analysis of Statutory Scheme:	

A. Schemes and Recommendations of Engineers.	26
B. The Statutory Scheme as Adopted by Congress Has no Real or Substantial Bona Fide Relationship to the Improvement of Navigation.	28
C. Project Has no Appreciable Effect Upon the Control of the Flood Waters of the Mississippi.	30
D. Allocation of Cost and Benefit of Statutory Scheme.	31
E. Intention of Congress with Respect to Flood Control Feature of Project.	33

F. Two Purposes of Project Are Functionally and Physically Separate.	35
G. Project Will not Produce Firm Power But Only Power for Auxiliary or Peak Load Demand for Sale to an Existing Interconnected Power Company.	39
H. Benefits of Flood Control Feature of Project.	41
I. Much Less of Appellant's Domain Would Be Required for a Flood Control Project Without Water Power.	44

Point IV.

Congress is plainly without constitutional authority to authorize the forcible invasion and destruction of Appellant's quasi sovereign rights, the taking of its domain or own fast lands, roads and bridges for the construction of the water power feature of the Denison Reservoir Project.	46
A. Power Over Waters of Non-Navigable Streams.	46
B. Power With Respect to Water Power Development.	46

Point V.

The Denison Project cannot be sustained under the Interstate Commerce Power.	50
---	----

Point VI.

The Denison Project as the same is being applied by Appellees and in so far as authority is claimed for the taking and destruction of Appellant's quasi sovereign, proprietary and boundary rights, cannot be sustained under the General Welfare clause.	54
--	----

Point VII.

The Denison project as authorized by Congress, and as the same is being applied by Appellees, is in contravention of the Tenth Amendment of the Constitution of the United States and the restrictions implicit in our dual form of Government.	55
--	----

- A. Plaintiff Would Lose Jurisdiction Over, and Its Subdivisions of Government Would Lose the Right to Tax the Land to Be Taken. ----- 55
- B. The Boundary of Appellant Would Be Obliterated for 40 Miles, Its Quasi Sovereign Rights Destroyed, Its Area Forcibly Reduced Contrary to the Holdings of this Court. ----- 55
- C. Appellant Has a Well Defined Statutory Program for the Conservation of its Waters and Water Resources With Which the Denison Project Directly Conflicts. ----- 56

Point VIII.

Since the statutory scheme purposefully inseverably and inextricably unites two functionally separate and independent projects, one being for the generation of water power, clearly beyond the power of Congress to enact, the whole Act falls. ----- 58

Point IX.

The declaration by Congress that this project is for the purpose of improving navigation, regulating the flow of Red River, controlling floods and other beneficial uses is not binding on the courts and does not preclude a judicial inquiry as to the facts. ----- 59

Point X.

The motion to dismiss which was sustained by the Trial Court admits all facts well pleaded. ----- 61

Point XI.

Power to condemn property exists only for public use, and a purpose outside of the Constitutional power of Congress is not a public use. ----- 61

CONCLUSION ----- 62

TABLE OF AUTHORITIES

Cases

<i>Arizona v. California</i> , (p. 37) 283 U. S. 423	49, 50
<i>Ashton v. Cameron Water Improvement District</i> , 298 U. S. 513, 531	55
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U. S. 288, 340	47, 50
<i>Berdie v. Kurtz</i> , 75 F.2d 898	18
<i>Bowen v. Johnston</i> , 306 U. S. 19, 23, 28	55
<i>Carter v. Carter Coal Company</i> , 298 U. S. 238, 295 54, 55	
<i>Cherokee Nation v. Southern Kansas Ry. Co.</i> , 135 U. S. 641	60, 62
<i>City of New York v. Miln</i> , 11 Peters, 102, 138	55
<i>Colorado v. Toll</i> , 268 U. S. 228	18
<i>Connecticut Railway & Lighting Company v. Pal-</i> <i>mer</i> , 304 U. S. 493	60
<i>Cornell v. Coyne</i> , 192 U. S. 418, 428, 429	53
<i>Crowell v. Benson</i> , 285 U. S. 22, 55	60
<i>Franklin Township v. Tugwell</i> , 85 F.2d 208	17, 21
<i>Generich v. Rutter</i> , 265 U. S. 388	19
<i>Georgia v. Tennessee Copper Co.</i> , 206 U. S. 230	19, 21
<i>Ginsburg v. Popkin</i> , 285 U. S. 204, 208	60
<i>Greenwood County v. Duke Power Company</i> , 81 F.2d 986	54
<i>Hairston v. D. & W. Railroad Company</i> , 208 U. S. 599, 606	61
<i>Hopkins Federal Savings & Loan Association v.</i> <i>Cleary</i> , 296 U. S. 315	55
<i>Howard v. Illinois, et al., R. R. Company</i> , 207 U. S. 463, 501	58

<i>Hudson County Water Company v. McCarter, Attorney General</i> , 209 U. S. 349, 355, 356	22
<i>Ickes v. Fox</i> , 300 U. S. 82, 97	17
<i>In re Debs, Petitioner</i> , 158 U. S. 564, 583, 584	22
<i>Kansas v. Colorado</i> , 185 U. S. 125, 142	21
<i>Kansas v. Colorado</i> , 206 U. S. 46, 93	46
<i>Kansas Gas & Electric Co., v. City of Independence</i> , 79 F.2d 638	54
<i>Kaukauna Water Power Co., v. Green Bay and Mississippi Canal Company</i> , 142 U. S. 254, 273 ..	46
<i>Keifer & Keifer v. Reconstruction Finance Corporation</i> , 306 U. S. 381, 388	17
<i>Kepner v. United States</i> , 195 U. S. 100	60
<i>Leovy v. United States</i> , 177 U. S. 621, 633	46
<i>Madisonville Traction Company v. St. Bernard Mining Company</i> , 196 U. S. 239, 251	61
<i>Minnesota v. Barber</i> , 136 U. S. 313, 319	60
<i>Missouri v. Holland</i> , 252 U. S. 416	18
<i>Mountain Timber Company v. Washington</i> , 243 U. S. 218, 237	60
<i>Mugler v. Kansas</i> , 123 U. S. 623, 661	60
<i>National Labor Relations Board v. Jones and Laughlin Corporation</i> , 301 U. S. 1, 30	53
<i>North Dakota v. Minnesota</i> , 263 U. S. 365, 375, 376 ..	21
<i>Oklahoma v. Texas</i> , 258 U. S. 574	5, 50
<i>Oklahoma v. Texas</i> , 260 U. S. 606, 636	5
<i>Oklahoma ex rel. Johnson v. Cook</i> , 304 U. S. 387	22
<i>Philadelphia Company v. Stimson</i> , 223 U. S. 604, 619	17
<i>Polk Company v. Glover</i> , 305 U. S. 5, 9	61
<i>Rhode Island v. Massachusetts</i> , 12 Peters, 657, 733 ..	55
<i>Ross v. Yearley</i> , 103 F.2d 589	18
<i>Ryan v. Amazon Petroleum Corporation</i> , 71 F.2d 1	18
<i>Ryan v. C. B. & Q. Railroad</i> , 59 F.2d 137	17

<i>St. Joseph Stock Yards v. United States</i> , 298 U. S. 38, 51	60
<i>Schechter v. United States</i> , 295 U. S. 495, 546	53
<i>South Carolina Power Co. v. South Carolina Tax Commission</i> , 52 F.2d 515, 524, Affirmed 286 U. S. 525	53
<i>State of Oklahoma ex rel. Phillips v. Guy F. Atkinson Company</i> , 37 Fed. Suppl. 93, 99	2
<i>Stewart (Charles C.) Machine Co. v. Davis</i> , 301 U. S. 548, 585	56
<i>Texas v. White</i> , 7 Wall. 700, 721, 725	55
<i>United States v. Appalachian Electric Power Company</i> , 23 Fed. Suppl. 83, 91	46
<i>United States v. Appalachian Electric Power Company</i> , --- U. S. ---, 85 L. Ed. 201	46, 47
<i>United States v. Butler</i> , 297 U. S. 1	54
<i>United States v. Chandler-Dunbar Water Power Co.</i> , 229 U. S. 53, 73	47
<i>United States v. Constantine</i> , 296 U. S. 287, 294 ..	60
<i>United States v. Cress</i> , 243 U. S. 316, 322	60
<i>United States v. Doughton</i> , 62 F.2d 936, 938	46
<i>United States v. Gettysburg Electric Railway</i> , 160 U. S. 668, 680	61
<i>United States v. Lee</i> , 106 U. S. 196	17
<i>United States v. Rio Grande Dam & Irrigation Co., et al.</i> , 174 U. S. 690, 709	46
<i>United States v. River Rouge Improvement Company</i> , 269 U. S. 411, 419	47
<i>Utah Power & Light Company v. Pfof</i> , 286 U. S. 165, 179, 182	53
<i>Webster v. Fall</i> , 266 U. S. 507	19
<i>Williams v. Standard Oil Co.</i> , 278 U. S. 235, 241	58

CONSTITUTION.

Constitution of the United States:

Article I, Section 8	13
Tenth Amendment	16, 55

STATUTES

<i>Act of Congress of June 28, 1938, c. 795, 52 Stat.</i> 1215	2, 65
Sec. 4 of <i>Act of Congress of October 17, 1940, H. R.</i> 9972 (Public No. 868, Chap. 895, 76th Con- gress 3rd Session)	3, 14
<i>Act of Congress of June 22, 1936, H. R. 8455 (Public</i> No. 738, 74th Congress) Section 7	23
Article 5, Chapter 70, <i>Oklahoma Statutes 1931</i> , as amended by Article 3, Chapter 70, <i>Oklahoma</i> <i>Session Laws 1935</i> , and Article 17, Chapter 24, <i>Oklahoma Session Laws 1937</i> . Appendix 3	84

MISCELLANEOUS.

<i>House Document 541, 75th Congress, 3rd Ses-</i> sion	6, 9, 14, 23, 25, 50, 51, 65
Comprehensive Flood Control Plans. Hearings be- fore the <i>Committee on Flood Control, House of</i> <i>Representatives, 75th Congress, 3rd Session,</i> March 30 to April 19, 1938, pages 24-25	23
<i>Report of Committee on Flood Control 75th Con-</i> gress, 3rd Session, (Report No. 2353)	24
<i>Hearings Before Sub-Committee of Senate on Ap-</i> propriations, H. R. 6260, 76th Congress, 1st Ses- sion, p. 201	32

APPENDIX ONE	65
APPENDIX TWO	67
APPENDIX THREE	84

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OCTOBER TERM,
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STATE OF OKLAHOMA ex rel. LEON C. PHILLIPS,
Governor of the State of Oklahoma, *Appellant*,
vs.

GUY F. ATKINSON COMPANY, a Corporation Under
the Laws of the State of Nevada, CLEON A. SUM-
MERS, United States District Attorney for the
Eastern District of Oklahoma, and CURTIS P.
HARRIS, Special Attorney, Department of Justice
of the United States, *Appellees*.

Brief for Appellant

This is a direct appeal from a final decree entered by the United States District Court for the Eastern District of Oklahoma on the 8th day of February, 1941, sustaining a motion to dismiss and dismissing a bill brought by appellant to enjoin the appellee, Guy F. Atkinson Company, a Corporation, from constructing the Denison Dam across Red River within the domain of appellant which would impound the waters of Red River and Washita River, in so far as said waters when impounded would inundate and destroy any of the lands, highways or bridges belonging to appellant or under its jurisdiction and control as a sovereign State, or which

waters, if impounded, would obliterate, change or interfere in any way with the boundaries of appellant, and to enjoin the appellees, Cleon A. Summers, United States District Attorney, and Curtis P. Harris, Special Assistant, Department of Justice, from instituting or conducting in any court within the State of Oklahoma any suit or proceeding for the condemnation of any lands owned by appellant or located within its domain, for the purpose of obtaining a site or right-of-way for the Denison Dam or reservoir to be created thereby, in so far as said land sought to be thus acquired is to be used in the construction of the dam and reservoir described and set forth and purporting to be authorized by the Act of Congress passed and approved on June 28, 1938, being H. R. 10618 (Public No. 761, 75th Congress, Chap. 795, 3rd Session) styled:

"An Act authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes,"

under color of which the appellees are proceeding, and on which they exclusively rely for their authority in all matters alleged in the complaint. It is contended that in so far as said Act purports to authorize the acts of appellees in the matters and things set forth in the complaint that the same is to that extent unconstitutional.

Opinion Below

The opinion of the District Court for the Eastern District of Oklahoma is reported in ---- Federal Supplement, pg. ---, and appears R. 22-31.

Jurisdiction

Petition for appeal was presented to the trial court on February 8, 1941, which appears R. 33-34. An order was made on February 8, 1941, allowing appeal which appears R. 40.

A statement of the grounds on which jurisdiction of this court is invoked has been separately filed in accordance with paragraph 1 of Rule 12 of this court. On March 31, 1941, this court entered an order noting probable jurisdiction.

Questions Presented

This case presents the question of the constitutionality of the Act of June 28, 1938, above mentioned, as appellees are applying and intend to apply the same, in so far as the same relates to or purports to authorize the Denison Reservoir on Red River in Texas and Oklahoma. The specific reference to said Act being:

"The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document No. 541, 75th Congress, 3rd Session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000.00."

Also in connection with said Act there is presented the question of the application and constitutionality of Section 4 of an Act of Congress approved October 17, 1940, H. R. 9972 (Public No. 868, Chap. 895, 76th Congress, 3rd Session) as the appellees are applying and intend to apply the same, which said Section 4 declares:

"The project for the Denison Reservoir on Red River in Texas and Oklahoma authorized by the flood control Act approved June 28, 1938, is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods, and for other beneficial uses."

The specific questions are:

1. Whether the complaint states a cause of action, entitling appellant to injunctive relief and this involves the consideration of the questions:
2. Whether appellant has a standing to sue to test the legality and constitutionality of the acts of the appellees done or threatened to be done under color of the terms of the Acts aforesaid:
3. Whether the Acts aforesaid, as the same are being applied by appellees and as appellees intend to apply the same, are for a public purpose within the enumerated or implied powers of Congress.
4. Whether said Acts, as the same are being applied and are intended to be applied by appellees are in contravention of the Tenth Amendment of the Constitution of the United States and contrary to the restrictions implicit in our dual system of government.

STATEMENT OF THE CASE

This action was instituted in the United States District Court for the Eastern District of Oklahoma on September 6, 1940. The appellant, as one of the States of the United States, on the relation of its Governor, sued the appellees and alleged that this is a case or controversy of a civil nature arising out of and involving the validity of an Act of Congress of the United States, being the Act passed and approved on June 28, 1938, hereinabove mentioned, as the same is being applied and is threatened to be applied by appellees. The complaint appears in the record at R. 1-13 and alleges that the appellees solely and exclusively rely upon said Act of Congress for all matters complained of therein.

The complaint further alleges that in a certain cause pending in this court styled: *State of Oklahoma, Complainant, v. State of Texas, Defendant, United States, Intervenor*, 258 U. S. 574, No. 20 Original, decided May 1, 1922, this court settled a controversy then and theretofore existing between the States of Oklahoma and Texas and the United States with respect to the navigability of Red River as to all matters set forth in the complaint, and with respect to the ownership of the bed of Red River, and that in said cause it was adjudged and decreed, among other things, that no part of Red River within the State of Oklahoma is navigable, and that the non-navigability of Red River has remained unaffected since the judgment and decree of said court, and that said stream is not now a navigable water of the United States; that in the same case and in a further order and opinion found in 260 U. S. 606, No. 18 Original, decided January 15, 1923, this court further adjudged and decreed that the boundary between Oklahoma and Texas,

where they are separated by Red River, is along the southern bank of said river which was defined by this court in the following language:

"Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it." 260 U. S. 636.

The complaint further alleges that the opinions, judgments and decrees of this court entered in said cause have been accepted and acted upon by all parties since the rendition thereof and are binding alike upon the State of Oklahoma and the United States.

The complaint further alleges that the part of the Act of June 28, 1938, as aforesaid, referring to the Red River basin refers to the stream involved in the proceedings referred to in the case of *Oklahoma v. Texas* as aforesaid, and that said Act, in so far as it relates to the Denison reservoir in substance, adopts House Document 541, 75th Congress, 3rd Session, and the engineers' report with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, and authorizes and directs the Secretary of War to acquire in the name of the United States titles to all lands, easements and rights-of-way necessary for said dam and reservoir project as outlined in said House Document 541; that as outlined in said House Document 541 there is to be constructed at a point some four or five miles northwest of Denison, Texas, and approximately sixteen miles southwest of Durant, Oklahoma, a huge earthen dam some four or five miles in length on and across Red

River, by far the greater part of which will be and rest upon Oklahoma soil, which dam will form a huge reservoir inundating approximately 150,000 acres of land of which approximately 100,000 acres are located in the State of Oklahoma and in the Oklahoma counties of Love, Marshall, Johnston and Bryan, and that said dam will impound the waters of Red River and Washita River, the last named being a tributary of Red River and wholly an Oklahoma stream.

The complaint further alleges that Red River flows in a southeasterly direction and that said dam is to be located approximately four miles east or below the mouth of the Washita River; that if said dam is built it will inundate approximately 100,000 acres of Oklahoma land the title to which will be taken in the name of the United States of which approximately 3800 acres is owned by appellant State in its sovereign capacity for use as a prison farm and for the support and maintenance of its public or common schools; that said reservoir will destroy many miles of highway and rights-of-way therefor including bridges, all of which are devoted to a public use, namely, travel by the citizens of Oklahoma and other States.

The complaint further alleges that for many years prior to the filing thereof appellant planned and built at great monetary cost an integrated and comprehensive system of highways entirely devoted to public use, a part of which traverses said proposed reservoir both in a northern and southern and eastern and western direction, and that all of said highways and bridges located in said reservoir will be destroyed by the acts and threatened acts of appellees thereby seriously interfering with the strategically located, vital and important

connecting links in the highway system of appellant to its irreparable injury.

The complaint further alleges that the approximately 100,000 acres of land located within appellant's domain which will be inundated is now inhabited by approximately 2000 families, or a total of 8000 people, citizens and residents of Oklahoma; that much of said land is rich soil in a high state of cultivation and is used by the inhabitants thereof as homes and as a means of livelihood; that at least 15,000 acres of the land to be inundated is highly productive of oil and gas on which there are now many large producing oil wells, and said complaint alleges that from recent geophysical and geological surveys at least 50,000 acres of the land to be inundated is underlaid with oil or gas; that extensive drilling operations are now under way for the further development of said lands for the production of oil and gas; that said State derives much of its income for the support of its State government, colleges, University and common schools from a gross production tax levied on oil and gas and that such tax resources will be, as to the lands inundated, destroyed by the construction of the reservoir, and that the loss to appellant State will be great and irreparable in tax revenues to the extent of seriously interfering with appellant in the execution of its governmental functions as one of the States of the American Union.

The complaint further alleges that the annual wealth production accruing to the inhabitants of the proposed basin from agricultural products alone is the sum of \$1,500,000.00.

The complaint further alleges that the waters of Red River and Washita River, after being impounded, are to be taken out of appellant's domain into the State

of Texas, run through conduits located entirely within that State to operate turbines for the generation of hydroelectric power for the purpose of sale principally in the area located in and around Dallas and Fort Worth, Texas. The waters thus to be impounded, largely on appellant's domain, belong to appellant and the taking thereof is without its consent and without compensation.

The complaint further alleges that the scheme for said dam and reservoir as projected in said Act of June 28, 1938, adopting House Document 541, provides for the construction thereof for the purposes of controlling the flood waters of the Red River and Washita River and for the generation of hydroelectric power; that the purposes of said project are under the statutory scheme inextricably and inseparably involved; that as provided by the statutory scheme, a dam is to be constructed 150 feet in height to spillway elevation, being from tailwater elevation 510 feet (sea level) to 660 feet; from elevation 510 feet to 590 feet, there is to be a dead storage pool for waterpower head; from elevation 590 feet to 620 feet there is to be a waterpower reservoir; from elevation 620 feet to 660 feet there is to be a flood control reservoir; from elevation 620 feet to 660 feet there is to be a flood control reservoir which flood control reservoir is to be superimposed on the power reservoir, and the power reservoir to be superimposed on the dead storage reservoir, which last is to be constructed solely in order to give a head for waterpower; that as set forth in the statutory scheme the first 110 feet in height of the dam is to be used solely and exclusively for the development of waterpower, and the superimposed 40 feet is to be used solely and exclusively for the impounding and discharge of flood waters; that the statutory purposes of said project are in no way related to each other

except by the circumstances of being at the same location and being purportedly authorized by the same Act; that the two purposes for which said reservoir and dam are authorized are functionally separate and neither is the incidental or necessary result of the other, that is, that the waterpower feature is not in aid of or related to the flood control feature; that the flood control reservoir as projected in said scheme cannot and will not affect the power feature thereof; that the flood control portion of said reservoir can only be used for the impounding and release of flood waters of Red River and Washita River; that the power reservoir will normally be kept full of water and that it is no part of said statutory scheme nor is it physically possible that the same part of the reservoir can be used for both flood control and waterpower purposes; that as set forth in the statutory scheme or Authorization Act, the waterpower portion of said reservoir is purposefully and separately created at the expense of the utilization for flood control of that part of the reservoir to be used for waterpower.

The complaint further alleges that as is provided in the Authorization Act, the Secretary of War and Chief of Engineers have modified the actual plans so that said reservoir is to be constructed at the following pool levels:

510 feet (sea level) tailwater elevation to 587* feet
for dead storage for waterhead

587 feet to 617 feet for power pool reservoir.

617 feet to 640 feet for flood control reservoir

The complaint further alleges that by reason of the modifications of the statutory scheme as aforesaid, said

*Record, p. 7, shows this figure 587 feet instead of 587 feet. The correct figure is 587 feet.

project has been changed from a reservoir inundating 3,400,000 acre-feet for power and 5,900,000 acre-feet for flood control to one for a reservoir inundating 3,080,000 acre-feet for power, and 2,745,000 acre-feet for flood control.**

The complaint further alleges that the appellee, Guy F. Atkinson Company, a Corporation, purporting to act under a contract with the Secretary of War or the Board of Army Engineers or the Chief of Engineers, has now located on the Oklahoma side of the proposed dam a great number of machines consisting of trucks, tractors, steam shovels, drag lines and other equipment, and is now beginning and is engaged in the construction of the dam across Red River which dam, when built, will be of the height set forth and will impound the waters of Red River and the Washita River as aforesaid, inundating and destroying the large acreage of land within the domain of appellant including its own fast lands, and that the building of said reservoir will permanently and totally destroy appellant's fast lands including valuable mineral deposits underlying the same for which it has not received compensation, and will totally and permanently destroy the lands owned by appellant's citizens and render impossible or very expensive the development of oil and gas underlying and which is now being produced from a large acreage of said land, resulting in the destruction of appellant's own taxable revenues and the taxable revenues of its subdivisions of government; that the appellees, Cleon A. Summers, United States Dis-

**In percentage the statutory scheme or Authorization Act devotes 75% of the height of the dam for power, and 25% for flood control. As modified 82% of the height of the dam is for power, and 18% for flood control.

In the statutory scheme or Authorization Act 37% of the inundated acre-feet is for water storage for power, and 63% for flood control. The modified plans devote 53% of the inundated acre-feet for water storage for power, and 47% for flood control.

trict Attorney for the Eastern District of Oklahoma, within whose district the Oklahoma part of said reservoir is to be located, and Curtis P. Harris, Assistant to the Department of Justice of the United States of America, have already instituted numerous condemnation suits for the purpose of acquiring the title to various tracts of land within the proposed reservoir, and that it is the purpose of said appellees to institute numerous additional condemnation suits for the purpose of acquiring additional land as right-of-way for said proposed reservoir, all of which lands are located within the domain of appellant.

The complaint further alleges that appellant has at no time given its consent to the acts and threatened acts of the appellees, but on the contrary has made numerous protests and objections to the construction of said project of which protests and objections appellees have actual notice.

The complaint further alleges that as a direct and proximate result of the acts and threatened acts of the appellees appellant will suffer irreparable damage and injury in that:

Thirty-nine subdivisions of its government will be destroyed, consisting of thirty-nine duly and legally organized and existing school districts and townships, and that four counties will be seriously affected by the inundation of a large part of the acreage of land within such subdivisions so that sufficient tax revenues cannot be obtained for such subdivisions to function; that the annual loss of taxable revenues from the land to be taken with no consideration thereof given for the loss of oil revenues, or revenues from agriculture and stock raising, or revenues from personal property taxation will be approximately \$40,000.00; that the acts and threatened acts of appellees

constitute a direct invasion and destruction of appellant's sovereign, territorial and proprietary rights in that its boundary will be destroyed for approximately 40 miles, it will be compelled to surrender its jurisdiction of the territory to be inundated, and the taking of many thousands of its best acres will be in effect a forcible reduction of the area of appellant.

Attached to the complaint is a map showing in detail the contour of the basin as it affects appellant, the school districts affected and the lands taken in each, the highways destroyed with other data material to a consideration of this case. This map appears in the Record p. 14A.

That the fast lands owned by appellant will be taken and its proprietary rights therein extinguished; its highways, including the rights-of-way thereof, bridges, means of communication will be interrupted and in a large measure destroyed and its integrated and comprehensive systems of highways and roads will be interrupted and impaired. Its waters will be taken from it in violation of its laws without the payment or offer of just compensation.

Approximately 8000 of appellant's citizens will be ousted from their homes thereby creating a serious social and economic problem the burden of which will fall largely upon appellant with no measure of compensation offered or afforded.

The complaint further alleges that said Denison Reservoir project as the same is being applied and is intended to be applied by appellees, and under which they are acting and solely and exclusively rely for their acts, is beyond the power of Congress to enact and is not within such powers express or implied conferred by the Constitution of the United States by Section 8, Article 1, or any other provision thereof, and that said acts and threatened acts of appellees constitute an unlawful invasion and destruc-

tion of its sovereign, quasi sovereign, territorial and proprietary rights reserved to it and protected by the Tenth Amendment of the Constitution of the United States.

Upon the filing of this complaint and after service upon appellees they filed their motion to dismiss which is shown Record 15-16. This motion was argued to the court on October 28, 1940, at the conclusion of which the court permitted the plaintiff to file an amendment to its complaint in view of the Act of Congress of October 17, 1940, being Section 4, of H. R. 9972, 76th Congress, 3rd Session. The amendment to the complaint was duly filed and appears Record 17-19 and in substance reaffirms all the allegations of the complaint as to said Section 4 of the Act of October 17, 1940, and alleges that in so far as said Section 4 attempts to declare the project for the Denison reservoir to be for the purpose of improving navigation or regulating the flow of Red River, or for other beneficial uses, the same is without factual basis and in effect is only a self-serving Congressional declaration; that said project as is set forth in the complaint does not in any way protect or improve the navigable portions of the lower reaches of Red River or the Mississippi River either by enriching the low water flow of said rivers as the incidental result of the operation of said flood control and hydroelectric power project except in the intangible, indirect, inconsequential and unsubstantial way set forth and described in House Document 541, 75th Congress, 3rd Session; that said project so outlined and adopted by Congress has no tangible, direct, immediate or consequential effect either for the improvement of navigation or for regulating the flow of Red River, or for other beneficial uses save and except as set forth and described in the aforesaid statutory scheme; that said Act of Congress does not and cannot affect the findings and decrees set forth in the case

of *Oklahoma v. Texas, United States, Intervenor*, as is set forth and described in the complaint. Said amendment further alleges that such inconsequential and intangible benefits to navigation as may result from said project would flow from the flood feature thereof and not the hydroelectric feature thereof.

To the complaint, as amended, appellees filed their motion to dismiss, Record page 19-21, and being in effect the same as the motion to dismiss filed to the complaint before it was amended. A three-Judge District Court was assembled who after hearing argument and on February 8, 1941, filed its memorandum opinion sustaining the motion to dismiss, (Record 22-31) and on the same date entered its judgment of dismissal, the judgment being found in Record at page 32.

SPECIFICATION OF ERRORS

Appellant urges each of the assigned errors* Nos. 1-34, (R. 34-39) inclusive:

Without waiving or limiting any of said assignments, more particularly the trial court erred,

1. In finding, concluding and decreeing that the Acts of Congress in question are constitutional as the same are being applied and are intended to be applied by appellees.
2. In finding, concluding and decreeing that the facts pleaded in appellant's complaint do not state a cause of action and in dismissing the complaint.
3. In finding, concluding and decreeing that the facts pleaded in appellant's complaint fail to show that the Acts of Congress on which appellees solely rely for their acts are not in excess of the powers of Congress to authorize.
4. In finding, concluding and decreeing that the facts pleaded in appellant's complaint fail to show that the acts of appellees are in contravention of its right guaranteed by the Tenth Amendment of the Constitution of the United States.

SUMMARY OF ARGUMENT

Appellant has attempted to detail the nature of its argument in the index at the beginning of this brief and believes that a further summary is not necessary.

*Assignments of Error 1-34, inclusive, in fact relate to one error of the court, namely, its order and judgment dismissing the complaint and denying appellant the injunction sued for. The various assignments of error attempt to break down and point out the error of the court in its memorandum opinion in assigning the reasons for reaching the conclusion it did. Appellant deems all of the assignments immaterial and inapplicable except the principal one relating to the assigned error of the court in sustaining the motion to dismiss. These errors have been assigned and are preserved to avoid any technical question should any of them be claimed as material findings or conclusions by implication.

ARGUMENT

Point I.

Appellant has the standing to maintain a suit to enjoin the illegal and unconstitutional acts of appellees and thereby test the Legality and Constitutionality of the Acts of Congress under which they claim to act.

(Subdivisions (a), (b) and (c) and (d), part one,
Motion to Dismiss)

The first ground of the motion to dismiss presents the question as to the jurisdiction of the court to proceed because (a) this suit is in reality a suit against the United States without its consent; (b) that no consent has or can be given by the United States to the institution of this suit; (c) the real controversy herein is between the State of Oklahoma and the United States, and (d) the Honorable Henry L. Stimson is a necessary and indispensable party to the proceeding.

Subdivisions (a), (b) and (c) may be discussed under one head. That this is not a suit against the United States, assuming the allegations of the complaint to be true, is sustained by the following decisions of this court:

United States v. Lee, 106 U. S. 196;
Philadelphia Company v. Stimson, 223 U. S. 604,
619;
Ickes v. Fox, 300 U. S. 82, 97;
Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 388;
Ryan v. C. B. & Q. Railroad, 59 Fed. 2d 137;
Franklin Township v. Tugwell, 85 Fed. 2d 208.

Sub-paragraph (d) of the motion to dismiss alleges:

"The Honorable Henry L. Stimson, Secretary of

War of the United States, is a necessary and indispensable party to these proceedings and has not been made a party herein."

It is the settled law as we understand it, that subordinate officers (and the Atkinson Company occupies that position since it is acting under a contract with either the Secretary of War or the Chief of Engineers, see *Ross v. Yearley*, 103 Fed.2d 589,) acting contrary to law cannot escape immunity from suit to restrain their illegal actions by reason of the fact that their superiors are not parties. This has been settled by the following authorities:

Colorado v. Toll, 268 U. S. 228, 230;
Missouri v. Holland, 252 U. S. 416;
Ryan v. Amazon Petroleum Corporation, 71 Fed.2d 1;
Berdie v. Kurtz, 75, Fed.2d 898.

The above authorities sustain the rule for which we contend in this case, and which was followed by the trial court. See Record 25. While it is perhaps true that some of the cases in the lower Federal Courts are in apparent or real conflict, we think that all of the decisions by this court and nearly all of the lower court decisions are easily reconcilable. The principles to be deduced from the authorities in our opinion are:

1. Suit may be maintained against an inferior federal officer without joining his superior to restrain allegedly unlawful acts committed within the jurisdiction of the court unless (a) the relief sought is in fact a mandatory injunction to do something which can only be done on the order of a superior officer who is not a party; (b) the relief sought will in fact control an administrative or quasi-judicial discretion vested in the superior officer.

2. A State in particular may maintain a suit against

an inferior federal officer without joining his superior to restrain an invasion of its quasi sovereign rights. The recognition of the superior right of a State to maintain such a suit is not anomalous to but is in accord with the settled principle that a State suing to vindicate its quasi sovereign rights, is more certainly entitled to relief than a private individual, and may insist upon the vindication of its quasi sovereign rights, although, balancing the equities, the court would not grant relief to a private individual.

Georgia v. Tennessee Copper Co., 206 U. S. 230, 237, 238.

In the argument before the court below appellees cited certain authorities in support of this part of their motion to dismiss among which are *Webster v. Fall*, 266 U. S. 507, *Generich v. Rutter*, 265 U. S. 388, in which cases the holding was made that the injunction could not be maintained because of the absence of the superior officer. These and other cases are easily distinguishable from the question presented by the appellant's complaint. One important distinction is they did not involve the right of a State to restrain an unconstitutional invasion of its quasi sovereign authority committed within its domain.

Colorado v. Toll explicitly holds that in such a situation a State may sue an inferior federal officer or employee without joining his superior. This case has never been overruled or modified. In a great majority of instances even a cabinet officer is subject to the direction of the President, and if the reasoning supporting sub-paragraph (d) of the motion to dismiss were sound, no suit could ordinarily be brought except against the President. That would not only be contrary to the entire history of our jurisprudence upon the subject but it would create an in-

tolerable situation both for the President and for litigants.

In the case of *Webster v. Fall*, the relief sought was in fact a mandatory order for the payment of federal money, the payment of which was within the administrative discretion or judicial determination of the Secretary of the Interior.

In the case of *Generich v. Rutter*, the plaintiff sued the State Prohibition Director because he refused to issue permits to the plaintiff for the purchase of quantities of spirits and wine in excess of the limitation fixed by the permit issued by the Commission. While the relief sought was phrased in the form of a request for an injunction to restrain the Director from giving effect to the restrictions in the permit, it is obvious that the relief sought was in fact a mandatory injunction.

In this case, if the relief sought is granted, the Contractor and attorneys would not be commanded to do anything but would merely be restrained from doing an illegal and tortious act within the domain of appellant. Moreover, whether or not the Denison project shall be built is not a question which has been confided to the discretion of the Secretary of War. Congress has directed the building of the project and it is no more necessary to make the Secretary of War a party than it would be to make the members of Congress parties.

Point II.

Appellant as Parens Patria has a right to maintain this suit.

(Subdivision (e) of part one Motion to Dismiss)

Subdivision (e) of the motion to dismiss is to the effect that appellant has a plain, complete and adequate remedy at law whereby to find redress for its alleged injuries, and whereby to protect its alleged sovereign, quasi sovereign, territorial and proprietary rights. Appellees contended below, and will perhaps contend here, that appellant can obtain redress for the alleged wrongs as matters of defense against suits in condemnation of its lands or under the Tucker Act for damages.

Appellant is not before the Bar of this court as a private litigant but as a quasi sovereign. The allegations of its complaint show that appellees are violating its sovereign, quasi sovereign and proprietary rights in taking its governmental property, the waters of its streams, obliterating its boundary, destroying its subdivisions of government, destroying its highways and transportation system, destroying its tax revenues, taking 100,000 acres of its domain from its sovereignty and jurisdiction, and ousting some 8,000 of its citizens from their homes. No political question is involved in this suit, nor is this suit one for an advisory opinion. Appellant's right as parens patrias to maintain this action is sustained by the following authorities from this court:

North Dakota v. Minnesota, 263 U. S. 365, 375, 376;

Kansas v. Colorado, 185 U. S. 125, 142;

Georgia v. Tennessee Copper Company, 206 U. S. 230;

Oklahoma ex rel. Johnson v. Cook, 304 U. S. 387;
In Re: Debs, Petitioner, 158 U. S. 564, 583, 584;
Franklin Township v. Tugwell, 85 Fed.2d 208;
Hudson County Water Co. v. McCarter, Attorney General, 209 U. S. 349, 355, 356.

In the case of *North Dakota v. Minnesota*, this court refers to:

"The right of the State as *parens patrie* to bring suit to protect the general comfort held by, or property rights of, its inhabitants."

In the case of *Kansas v. Colorado*, the court speaks of the right of the State to invoke:

"The original jurisdiction of this court * * * as *parens patrie* trustee, guardian or representative of all or a considerable portion of its citizens * * *."

In the case of *Georgia v. Tennessee Copper Company*, this court upholds the right of the State to sue "for an injury to it in its capacity of quasi sovereign" and further says:

"In that capacity the State has an interest independent of and behind the titles of its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. It might have to pay individuals before it could utter that word, but with it remains the final power."

Point III.

The Denison Reservoir is a multiple purpose project on a non-navigable stream wholly within appellant's domain combining two functionally and physically separate and unrelated purposes.

The Denison project had its statutory beginning in the Flood Control Act approved June 22, 1936, (H. R. 8455, Public No. 738-74th Congress). Section 7 of said Act provides:

**"The Secretary of War is hereby authorized and directed to continue surveys, studies, and reports at the following named localities, where, according to the surveys and estimates already made, opportunities appear to exist for useful flood control operations with economic development of hydroelectric power whenever sufficient markets to absorb such power become available, the cost of these surveys to be paid from appropriations heretofore or hereafter made under the authorization in this Act or subsequent similar Acts
* * * Denison Reservoir, Texas."**

Pursuant to the provisions of the above Act the Army Engineers made a further and additional survey as to the feasibility of the Denison project and embodied their report to Congress, which is referred to throughout this proceeding as House Document 541, 75th Congress, 3rd Session. An extensive hearing was held before the Committee on Flood Control of the House of Representatives embodied in the printed report of such hearings referred to as "Comprehensive Flood Control Plans. Hearings before the Committee on Flood Control, House of Representatives, 75th Congress, 3rd Session, March 30 to April 19, 1938." On pages 24 and 25 of said document appears the testimony of General Schley, Chief of Engineers, as to the advisability of combining flood control and hydroelec-

tric projects from which it appears* that the two are essentially in conflict and that the Denison project was recommended for multiple purposes in order to give the project some semblance of economic justification. The Committee on Flood Control, 75th Congress, 3rd session (Report No. 2353) said with respect to his particular project (p. 5-6):

"Only two of the dams in the bill provide for the development of power. These are the Denison on the Red River, which is primarily for flood control, but in accordance with the policy where power and flood control can be combined, provision is made for power at the Denison dam along the Red River. Four states are affected. The other multiple reservoir which provides for both flood control and power is on the New River in West Virginia and is known as the Blue Stone Reservoir."

On page 21, specifically referring to the Denison project, the Committee says:

"Hydroelectric power will be developed at the site, which will benefit two or more states * * *. The total benefits including revenues from the sale of power, justifies the expenditure for the project, particularly

*MR JARRETT: Do you think an hydroelectric dam negatives flood control or helps it?

GENERAL SCHLEY: The two are essentially in conflict to this extent, that the flood control reservoir should be emptied as promptly as possible to make capacity for the next flood. For power or for irrigation, the water is impounded and the reservoir is kept full to the greatest possible extent and for that reason the two are in conflict. However, it is not at all uncommon to have one reservoir superimposed on the other, flood control capacity on top, impounding capacity below, where you have such a suitable site. ***

MR. JARRET: Would you say with the dam not to have hydroelectric either private or government owned:

GENERAL SCHLEY: I would not say that. An example is the Denison project, a combined reservoir. Without the power which it will generate and sell, the dam probably could not be justified. Its cost would be too great for the benefits unless you got the incidental benefit from the sale of power. This is an example of a combination dam in which a reservoir is superimposed on the other."

in view of the rather rapid development taking place in the area."

House Document 541 containing the statutory scheme of the Denison project was adopted by Congress and the project was directed to be constructed "with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable * * *. Pertinent provisions of said Act are shown in Appendix one. The same Act of Congress, apparently for the sake of convenience and to greater facilitate the passage of said Act, authorized the construction of many separate projects in sections and upon streams remote and far in distance from the Denison project. For example, projects on the Connecticut River Basin; Marshy Hope Creek, Maryland; Hudson and Mohawk Rivers, New York; Savannah River, Georgia; Ohio River Basin; Spokane River, Washington, and Tanana River, Alaska.

It is a matter of judicial knowledge that most if not all of the projects authorized by the 1938 Act, other than the Denison project, are to be built on navigable waters of the United States. It cannot be claimed that the Denison reservoir is an integral or necessary part of any other project authorized by the 1938 Act, H. R. 10618. House Document 541, which was adopted by Congress, deals with no project other than the Denison reservoir. The recommendations therein contained are in no wise contingent upon or a part of the construction of any other project authorized by the Act.

To assist the court in a clear understanding of the statutory scheme which was adopted by Congress, we will analyze in a brief way the findings and recommendations of the engineers as contained in House Document 541.

A—Schemes and Recommendations of Engineers

The engineers submitted to Congress three plans for a reservoir at this site.

Plan (a) calls for a dual-purpose reservoir for flood control and the development of hydroelectric power. Plan (b) calls for a flood control reservoir only, plan (c) calls for a flood control reservoir with provisions for future power installations. (See p. 6-7 Report of Chief of Engineers, p. 41-57-58-74-79 Report of District Engineers, H. D. 541.)

The reports of the engineers are unvarying in their recommendations that the Denison project be adopted and authorized for two functionally separate purposes, namely, flood control and the production of hydroelectric power. The District Engineer recommended the project in the following brief summary found on p. 79 (H. D. 541):

“Recommendations. It is recommended that the proposed Denison Reservoir, developed either for flood control and power or flood control only, be classed as a project with benefits and charges approaching an economic balance and that it be so presented for Congressional action with appropriate references to the questions of policy and evaluation of intangibles involved as considered from a national viewpoint; that the preference with respect to economic desirability and adoption, as among the three schemes of development proposed, should be in order of priority, (1) combined power and flood control; (2) flood control with provisions for future installation of power facilities; (3) flood control only.”

The Division Engineer, summarizing his report, at p. 94, H. D. 541, says:

“It is recommended that the project be presented to the Congress as one which embraces useful flood control and economical production of power (on the assumption that the flood-control project is to be built in

any event) for which power the development of a suitable market appears probable; as a project which should contribute largely to the prosperity and development of the region which it is designed to serve, and as one which, by judicious adjustment of storage between power and flood control, can probably be made to yield benefits commensurate with costs."

The Board of Army Engineers at p. 12, (H. D. 541) say:

"Subject to the above remarks, the Board recommends the construction of a dam on the Red River near Denison, Texas, for the combined purposes of flood control and the development of hydroelectric power, the project to be constructed in general accord with the plans presented by the district engineer and to be operated as Congress may direct, all at an estimated cost to the United States of \$54,000,000.00."

General Schley, Chief of Engineers, at p. 10 (H. D. 541) says:

"Subject to the foregoing, the Board recommends the construction of a dam on the Red River near Denison, Texas, for the combined purposes of flood control and the development of hydroelectric power, the project to be constructed in general accord with the plans presented by the district engineer and to be operated as Congress may direct, all at an estimated cost to the United States of \$54,000,000.00."

After due consideration of these reports, and of the rapid development which is taking place in this territory, I concur in the views and recommendations of the Board."

**B—The Statutory Scheme as Adopted by Congress Has
no Real or Substantial Bona Fide Relationship
to the Improvement of Navigation**

On p. 3 (H. D. 541) General Schley says:

"In the reports on Red River contained in House Document No. 378, Seventy-fourth Congress, which were prepared under the provisions of House Document No. 308, Sixty-ninth Congress, and Section 10 of the flood-control act approved May 15, 1928, the conclusions were reached that the flow of the river, even if conserved and regulated by reservoirs, is insufficient to afford a commercially useful channel without slack-watering by the construction of locks and dams; and, further, that because of the pronounced tendency during floods toward bank caving, the creation of cut-offs, and the formation of high sand bars in the channel, a slack-water navigation improvement would be unsuccessful unless supplemented by a system of reservoirs for the regulation of stream flow."

On p. 13, being the syllabus to the reports of the District Engineer, we find this:

"Irrigation and navigation consideration have only a minor and indirect bearing upon the subject."

In the report of the District Engineer found on p. 65, we find this:

"Jefferson, Texas, which is on Cypress Bayou, an arm of the Red River near Shreveport, Louisiana, was the head of navigation on Red River before the railroads were built . . ."

There is now practically no commercial navigation above Alexandria, Louisiana, except for the local commerce on the Jefferson-Shreveport waterway between Morristown, Louisiana, and Jefferson, Texas."

By way of explanation, Alexandria, Louisiana, is 122 miles above the mouth of Red River. The Denison Dam is to be located 751 miles above the mouth of Red River. On p. 67 the District Engineer says:

"However, even complete regulations of the entire flow passing Denison would not provide adequate depths for year around modern barge navigation in the upper reaches of the river without the provision of other facilities such as locks and dams. There is very little water-borne commerce on the Red River and that is almost entirely confined to the lower part of the river from Alexandria, Louisiana, to its mouth * * *. The only physically feasible navigation improvement for the Red River, providing a 9-foot dependable navigable depth above the mouth of the Black River, would be by locks and dams supplemented by reservoirs. Present or prospective commerce, however, would not justify the cost involved. The construction of the Denison Reservoir would have a favorable effect on open channel navigation by reducing flood stages and increasing low water flows."

On p. 66, (H. D. 541), the District Engineer points out that due to the bars and wide flood plains of the Red River, a system of locks and dams would cause increased flooding of agricultural lands, and further points out:

"A system of locks and dams with reservoirs on the headwaters and/or tributaries to stabilize flow is believed to be the only satisfactory solution to the navigation problem on the Red River. *The dam should be of the movable type utilizing either high or low lifts, preferably the former, as that would have a lower first cost and provide better navigable depths.*"

C—Project Has no Appreciable Effect Upon the Control of the Flood Waters on the Mississippi.

On p. 13 of House Document 541 the District Engineer says:

“The proposed project would have but limited dependable effect upon flood conditions in the lowest reaches for the Red River or Mississippi except as an added safety factor for existing or proposed flood control facilities.”

On p. 77, (H. D. 541), the District Engineer, with respect to this phase of the matter, says:

“Among other so called intangibles or rather benefits difficult of direct evaluation, there might be mentioned the following:

• • •

(g) *Incidental value of reservoir to flood control in the lower Mississippi Valley.*”

On p. 86 is found the views of the Division Engineer on this question in which he says:

“The report finds that with a flood such as 1908 in the Red River, the proposed reservoir would have affected a reduction in flow of about 35,000 cubic feet per second. A reduction of that amount, if long enough sustained, would imply a reduction in stage averaging 1.3 feet between Alexandria and Moncla, and a reduction of 0.15 feet in the flow lines of the Atchafalaya Basin and the main river below Old River, provided they were at peak stage. At lower stages the effect would be greater, but less necessary. In addition, the magnitude of the effect would depend upon the size and origin of the concurrent flood in Red River, and upon the basis of reservoir operation.”

The attention of the court is directed at this point to Map 2 of House Document 541 which sets forth the picture of the flood basin of the Red River which this project is intended to benefit. The map outlines the flood basin, not upon the largest known flood of record, which was that of 1908, but upon a mythical flood some three times greater than the flood of 1908 which the engineer "projects" might happen. It will be noticed that the beneficial plain, that is, the plain which this project is supposed to benefit, stops at Alexandria, Louisiana, which is 122 miles above the mouth of Red River or where that stream inflows into the Mississippi. It will thus be seen that under the statutory scheme as adopted by Congress there is nothing probable, tangible or resembling any substantial benefit from this project for the control of flood waters of the Mississippi. No monetary benefit is estimated to result either to the improvement of the navigation of Red River or for control of the flood-control waters of the Mississippi. Instead, the statutory scheme, (H. D. 541), clearly points out that the flood plain stops at Alexandria, Louisiana, which is 122 miles from the mouth of Red River and is above the navigable reaches of Red River so far as water-borne commerce is concerned.

D—Allocation of Cost and Benefits of Statutory Scheme

The statutory scheme separates the cost of the project as between power and flood control. The District Engineer allocates \$38,279,000.00 as the cost of the flood control feature of the project (being the identical estimated cost of flood control alone, Scheme b), and \$15,202,000.00 as the cost of the power feature thereof. (See p. 60 H. D. 541). General Schley, Chief of Engineers, allocates the annual

costs and benefits of the dual-purpose reservoir as follows: (See p. 7)

Annual cost:	Flood control -----	\$1,864,000.00
	Power -----	1,643,000.00
Annual benefits:	Flood control -----	1,767,000.00
	Power -----	1,705,000.00

In the testimony of General Tyler before the Sub-Committee of the Senate on appropriations on the consideration of H. R. 6260 (the Act to appropriate money to begin construction of this project), he estimates power benefits at \$1,417,000.00, and flood benefits at \$1,594,000.00. (See p. 203 hearings before the Sub-Committee of the Committee on appropriations United States Senate, 76th Congress, 1st Session on H. R. 6260). The benefits which General Tyler estimates would accrue are as follows:

Preventable agricultural damages -----	\$1,340,000.00
Other preventable damages -----	258,000.00

(The aggregate of General Tyler's figures is \$1,598,000.00 although he says the total is \$1,594,000.00. This is probably accounted for by reason of some typographical error.)

The statutory scheme (H. D. 541 p. 45), allocates the acre-feet involved in the reservoir as follows:

(a) Dead storage -----	1,400,000	acre-feet
(b) Power pool storage -----	2,000,000	" "
(c) Flood pool storage -----	5,900,000	" "

As the plan is being executed the acre-feet involved in the reservoir are as follows:

- (a) Dead storage ----- 1,020,000 acre-feet
- (b) Power pool storage ----- 2,060,000 " "
- (c) Flood pool storage ----- 2,745,000 " "

E—Intention of Congress with Respect to Flood Control Feature of Project

It was the undoubted intention of Congress that this project should be predominantly for flood control. In the Committee report recommending the passage of H. R. 10618 (Report 2353 p. 21), the Committee says:

"It will have a flood storage capacity of 5,900,000 acre-feet out of a total available capacity of 9,300,000 acre-feet."

In the statutory scheme adopted by Congress (H. D. 541), General Schley says:

"It appears that not less than 6,000,000 acre-feet of storage are required for effective flood control. While this volume of storage will not provide full protection to the areas below the dam against floods ap-

*General Tyler before the Sub-Committee of the Senate on appropriations, 76th Congress, 1st Session, on H. R. 6260, and on p. 201 gave the following testimony with respect to this very important and pertinent matter:

SENATOR ADAMS: I have looked over the report, and I am prompted to make some inquiry and ask some questions about the type of the dam and the height of the dam.

GENERAL TYLER: The spillway crest is at elevation 640 above sea level.

SENATOR ADAMS: What is the height of the dam above the river bed?

GENERAL TYLER: The height of the dam is 165 feet. The land flooded at the 640-foot elevation is 35,900 acres in Texas, and 91,700 acres in Oklahoma, or a total of 127,600 acres. The storage, dead and silt storage,—that is, the storage from which you get the power head, and of course that can be partly silted up,—is 1,020,000 acre-feet; the power storage, 2,060,000 acre-feet; flood control storage, 2,745,000 acre-feet; or a total storage below the spillway crest, 5,825,000 acre-feet.

proaching in magnitude the estimated maximum probable flood, any increased allocation to flood control storage would encroach unduly upon the reservoir capacity essential to the successful generation of hydroelectric power and hence is found to be inadvisable from an economic standpoint."

The District Engineer says: (p. 71)

"However, when economic factors are evaluated it appears that the amount of storage allocated to flood control should be about 6,000,000 acre-feet."

The Division Engineer says: (p. 88)

"There are, of course, any number of ways of dividing the available storage. The one selected for study is that which reduces flood storage to 4,000,000 acre-feet, which approximates the volume estimated for the maximum flood of record (1843) whose average frequency is once in 90 to 100 years. This is probably the least flood storage that should be considered."*

On p. 6 (H. D. 541), General Schley says:

"Under the scheme of operation proposed by the District Engineer, the upper 5,900,000 acre-feet of capacity between elevation 620 and the crest of the spillway 660 are allocated to flood storage; the 2,000,000 acre-feet between elevation 620 and 595, the latter being the minimum elevation affording a satisfactory powerhead, allocated to power storage; and the remaining 1,400,000 acre-feet below elevation 595 to dead storage."

As shown by the reports of the engineers, the height of the dam from elevation 510 feet (sea level) to 595 feet is for "dead storage" which, according to the reports and rec-

*The complaint alleges that the statutory scheme for the project has been modified so that instead of being one preponderantly for flood control, the same is now one preponderantly for the development of waterpower. (See p. 7-8 Record)

ommendations of the engineers is for the purpose of creating a waterhead for power. In other words, in order for the force of the water to be sufficient to turn the turbines it is necessary for it to have a sufficient head. This head could be secured in no other way except by using a permanent reservoir for dead storage. The higher the water, the greater the force with which it would run through the turbines. According to the report of the engineers which was adopted by Congress, 5,900,000 acre-feet of the basin is for flood control, and 2,000,000 acre-feet (not including dead storage,*) is for water power. The complaint alleges that as the plan is being executed by the appellees 2,745,000 acre-feet is for flood control, and 2,060,000 acre-feet for waterpower (not including dead storage.) As the plans of the project have been modified and as the same are being executed the percentage of use of the project for flood control has been greatly reduced, and the percentage of use of the project for waterpower has been greatly increased. **

F—Two Purposes of Project are Functionally and Physically Separate

The complaint alleges, and the motion to dismiss admits, that the flood control feature of the project and the waterpower feature of the project are functionally and physically separate. The reports of the engineers, the hearings before the Flood Control Committee of the House,

*Dead storage for waterhead requires 1,400,000 acre-feet (H. D. 841, p. 41).

**The reason for this change is given by General Tyler in his testimony before the Sub-Committee of the Senate on Appropriations (War Department Civil Functions Appropriation Bill 1940 on H. R. 6260, p. 201) where he said:

"Yes; the spillway crest of the dam has been lowered from 600 to 640 feet above sea level, because, after careful study, it is believed that is the most economical height for the best combination of flood control and power."

the report of said Committee, are unvarying that the project was authorized for two functionally separate purposes and is being so executed. The allegations of the complaint show that neither purpose of the project is the incidental result of the other, and in fact the flood control feature and the waterpower feature are physically separate.

That the two purposes of this project are functionally separate is apparent from a casual reading of the statutory scheme, the report of the Committee of the House of Representatives and the testimony before the Committee prior to the adoption of the Act. The picture is aptly given by the Division Engineer wherein he says: (H. D. 541, p. 88)

"In the instant case the flood control storage is above enormous pools of power and dead storage."

The District Engineer says: (H. D. 541, p. 46)

"The gross capacity of the reservoir would really be composed of three parts, permanent storage, power storage, and flood storage. Except during flood periods, the reservoir would not be filled above the normal elevation of the power pool."

The statutory scheme for the project and as the same is being executed, might be compared to a 3-story house, the first story for dead storage, the second story for power and the third story for flood control.

The upper 40 feet of the dam, set apart in the report of the engineers (H. D. 541) for flood control, and the upper 23 feet of the dam as the plans have been modified, set apart for flood control, does not mean that the lower 110 feet of the dam and site occupied by the power project (lower 107 feet as the plans have been modified) are either necessary or useful for flood control. It merely means that if the government is going to construct a pow-

er project occupying all of the site up to 110 feet, it must build 40 feet higher (23 feet higher as the plans have been modified) if it is to provide a flood control project at all at this site.

The statutory scheme provides, and the complaint alleges, that as the project is being built the same embraces two purposes or projects which are not only functionally different and functionally conflicting, but which are also physically separate.*

The power storage, including dead storage, is, according to the statutory scheme, practically a permanent reservoir. The District Engineer on this question says: (H. D. 541, p. 41)

"The power storage in ordinary runoff years would be operated with but a few feet of drawdown below elevation 620. (The top of the power pool. Our insertion), but during drouths the drawdown might be as low as elevation 595 (the top of the dead storage pool. Our insertion), or a maximum of 25 feet."

On page 47 the engineer points out that only during extremely dry years, such as 1909-12, would there be any depletion of the power pool.

The power part of the project does not and cannot provide any reliable flood storage except to the limited and improbable degree as pointed out by the District Engineer that during periods of extreme drouth the power pool might be lowered. If such were the case, then neces-

*On this very point the government attorneys in the case of United States v. Appalachian Electric Power Company, ___ U. S. P. ___, 85 L. ed. 201. (No. 674, October Term, 1939) say in their brief (p. 111 of government's brief):

"There is an inherent conflict of interest between the operation of the dam and reservoir for power purposes and its operation for flood control purposes. For power purposes it is best to have the reservoir always filled to capacity. For flood control purposes it is at times desirable that the reservoir be drawn down to provide storage space for cushioning floods."

The Solicitor General and other Counsel for the government in saying the above, stated a patent fact.

sarily the power pool would have to be filled before the flood control pool would come into operation. The flood control reservoir will be kept empty except when it is temporarily impounding or discharging flood waters. The temporarily retarded flood waters cannot be utilized for the production of commercial power for the runoff would be rapid and not dependable for power use. The same part of the same site cannot be used for both flood control and the production of waterpower. There is a sharp distinction between a flood control reservoir which must be kept empty except when temporarily in use in time of flood, and a navigation pool on a navigable stream where water impounded to create a navigation level necessarily and incidentally creates waterpower. There is no such thing as the incidental creation of commercial waterpower by a flood control project. It is true that in the statutory scheme the engineers relate the cost and benefits of the two functionally separate projects so that to that extent they relate to each other. The District Engineer says: (H. D. 541, p. 32)

"Although this reservoir would approach economic justification if constructed exclusively for flood control, the income from power developed in conjunction with flood control would in part absorb this deficiency since the value of the available power would be somewhat in excess of its cost. It is apparent that the relative amounts of annual return, flood benefits or power revenues, from each of the two functions of a dual-purpose development are quantitatively dependent upon the manner in which storage potentialities of the site are apportioned between these two functions. It is believed, however, that an increased allocation of such storage to flood control at the expense of power would not materially alter the above conclusion except perhaps to show economic deficiencies for both phases of the development."

The Division Engineer says, on p. 88:

"There are, of course, any number of ways to divide the available storage."

On p. 94 the Division Engineer, in order to better the economic feasibility of the plan, reallocates the storage so as to provide 4,000,000 acre-feet for flood control, and 3,900,000 acre-feet for power.

So far as this project is concerned, the flood control and waterpower projects are just as separate as though the projects were being built on separate locations, and just as separate as if a reservoir for dead storage and power were in one location, and a reservoir for flood control in another location.

While in periods of low water, droughts and light rainfall the power storage run-off could conceivably lower the power pool, the engineer states, in ordinary years the power pool would "operate with but few feet of draw-down."

G—Project Will not Produce Firm Power But Only Power for Auxiliary or Peak Load Demand for Sale to an Existing Interconnected Power Company

The above statement is demonstrated on p. 49 (H. D. 541) where the engineer says:

"As an indication of the project's value for emergency or breakdown service, if made a part of a large inter-connected system, it should be noted that with a full reservoir at the start (power pool full. Parenthesis ours), almost the full amount of the initial installation (75,000 Kilowatts) could be produced continuously, twenty-four hours per day, for about ninety-two days. Under the same conditions, almost a full amount of the ultimate installation, (125,000 Kilowatts) could be produced continuously for about fifty-five days."

On p. 71 the engineer says, with respect to the power feature of the project and the demand for power:

"This demand will be principally for peak power, to meet which demand hydroelectric plants, in conjunction with storage, are practically adapted."

On p. 77 the engineer says under subparagraph (m):

"Sufficient storage would be available to operate on a 24-hour continuous basis, the 75,000 Kilowatt installation for a period of three months."

The statutory scheme projects the water power feature of the project not for the production of firm power (continuous power 24 hours per day), but only for auxiliary or peak load requirements two or three hours per day.

The District Engineer says on p. 49 (H. D. 541):

"For about 12½ per cent of the time, the full initial installation (75,000 Kilowatts) could be operated continuously."

In other words, three hours per day. Greater installation could be operated fewer hours per day.

General Schley, in referring to this same matter on p. 7, speaks of the ability of the project to carry "a definite portion of the peak capacity requirement of the area and thus obviate the need for capital investment in new plants."

The power thus to be produced is projected to be sold into areas centering around Dallas and Fort Worth, Texas.

On this point General Schley says: (p. 7)

"In these comparisons he (district engineer) adopts the potential power revenues * * * with market restricted to the Dallas-Fort Worth area."

The District Engineer says: (p. 62)

"It would appear that the most logical market alternate for the Denison project would be No. 4 or 4-a, the Dallas area."

On p. 71, the District Engineer says:

"The most logical outlet for the power from the Denison project is through the area south of the Red River which is designated in this project as Alternate No. 4. This area centers around Dallas and has transmission lines within twelve miles of the dam site."

The Division Engineer confirms this statement. (See p. 81)

H—Benefits of Flood Control Feature of Project

The District Engineer says (p. 29 H. D. 541):

"FLOOD DAMAGES: Flood damages in the Red River Valley are chiefly confined to agricultural lands and crops. In general, there are but few of the works of man such as cities, villages, highway or railway bridges, or even farm buildings in the ordinary flood plain of the river. Some damage to these would be incurred only by great floods such as the maximum probable flood derived in this investigation. The crop damages caused by floods are so extensive in the valley that they constitute a major economic problem to the landowners, tenants and sharecroppers."

He further says that the project will afford flood protection to lands in four states in the following proportion: (See p. 11). Two-fifths to Louisiana and one-fifth each to Oklahoma, Texas and Arkansas.

The largest known flood of record is that of 1908, and it is estimated that this project would give partial protec-

tion to 397,065 acres of cleared land between Denison and Alexandria, Louisiana. (See p. 6). The peak of the 1908 flood in second feet at Denison was 470,000. (See p. 41). The run-off volume of the 1908 flood was 2,712,000 acre-feet. The engineer says that "the floods discussed are those of which a large portion of the run-off originates west of Denison, Texas, and such floods are the only ones which the Denison reservoir would be effective in controlling and alleviating the damage." (See p. 70).

The engineer means by this that as to many disastrous floods caused by the tributaries east or below the dam such as Blue River, Boggy River, Kiamichi River, Little River, in Oklahoma, and the Sulphur and Cypress rivers in Texas, ~~that~~ this reservoir would not be effective.

The District Engineer does not attempt in House Document 541 to set forth the annual damages caused by the floods of 1908, 1915, or 1935, but does say the damages were local and principally agricultural. Apparently the losses from these floods were not sufficient to give sufficient semblance of economic justification for the flood control feature of the project. The engineer then assumed some hypothetical facts and made therefrom some hypothetical calculations. In substance, made a study of some seventy storms which have occurred in the area and estimated that the greatest flood that might reasonably be expected would result from a 3-day rainfall averaging 7.8 inches over the entire basin. (See first paragraph p. 71, and first paragraph on p. 4 H. D. 541). As a result of this hypothetical combination of storms the engineer estimates a superflood having a peak flow at Denison of 1,250,000 cubic feet per second, nearly three times as great as the 1908 flood. The District Engineer says that there was some evidence of a flood of this nature occurring in the year 1843. As a result of this calculation the District Engineer, as well as the Chief of Engineers,

determined that the flood storage of the reservoir should be about 6,000,000 acre-feet (in the modified plans reduced to 2,745,000 acre-feet). The Division Engineer exploded this hypothetical calculation in the following language: (See p. 86)

"It is also difficult to assign a monetary value to the protection which the project would afford against floods of greater magnitude than those of the past 30 years. It is not believed legitimate to assume as the report does that a superflood, transcending all experience, will occur within the next 50 years, and that, in consequence, protection against its assumed ravages may be valued at par in computing benefits. No such flood, or anything approaching it, has ever been known on this drainage area, nor until quite recently, in all probability, had anything like it ever been conceived."

It is on the basis of the hypothetical flood, some three times as great as the flood of 1908, that the annual flood benefits are estimated to be \$1,767,000.00 as shown on p. 7 (H. D. 541). It is on the basis of this mythical flood that highways, railroads and other methods of communication would be interrupted and destroyed; Shreveport and Alexandria, Louisiana, and small towns would be inundated; railroad bridges, highway bridges would be destroyed, air fields would be inundated and other great damage would occur as set forth in Appendix H to House Document 541. Appendix H is referred to in House Document 541 but is not copied nor attached thereto but appears as Appendix two of this brief. The court will observe that under the engineer's estimate of the hypothetical flood that the annual damages calculated are identical with the flood control benefits set forth in the report of General Schley found on p. 7 (H. D. 541).

In the argument on the motion to dismiss, counsel for appellees contended that House Document 541 affords a constitutional basis for Congress to authorize this project for the protection of interstate commerce. This contention was apparently based on the report of the engineers shown in Appendix H. While it must be admitted that floods such as 1908 caused serious damage, we submit that no real or substantial basis is afforded by the engineers' hypothetical flood for any contention that interstate commerce is substantially or directly hampered or interfered with by any flood comparable to that of which we have a reliable record.

I—Much Less of Appellant's Domain Would Be Required for a Flood Control Project Without Waterpower.

We have already pointed out that the engineers submitted to Congress three plans or schemes for the Denison project, the dual or multiple purpose plan, being the one recommended by them and adopted by Congress. On p. 32, House Document 541, the District Engineer says:

"Although this reservoir would approach economic justification if construed exclusively for flood control, the income from power developed in conjunction with flood control would in part absorb this deficiency since the value of the available power would be somewhat in excess of its cost."

On p. 42, H. D. 541, the engineer says:

"The reservoir, either designed solely for flood control or for flood control initially but with provisions for future power facilities, would have its spillway crest and elevation 640; and based upon the same flood assumptions as outlined for the dual-purpose reservoir the top of the earth dam would be an elevation 675. It is thus seen that there is but 20 feet difference in height of the dams designed

for flood control only, and for the dual-purposes of flood control and power development, as the former requires a dam of about 165 feet in maximum height, and the latter one of 185 feet."

The additional 20 feet in height of the dam made necessary for the multiple purpose project on account of the very flat characteristics of the Red and Washita River valleys and their tributaries forming the reservoir area requires a very much greater acreage of appellant's domain than would a project for flood control only. This is pointed out in considerable detail by the District Engineer on p. 45, H. D. 541. Then the engineer again says:

"For the reservoir created for flood control only a dam is required with top elevation of 675,"

as against a top elevation of 695 feet for flood control and power.

The District Engineer, in giving a summary of the estimated cost of the various schemes, sets forth (pp. 57-58 H. D. 541) that with respect to Scheme (a), being the multiple purpose project, much more land is required than for Scheme (b) for flood control only. While the difference in acreage is not set forth, the land costs are estimated for Scheme (a) at \$8,000,000.00, while for Scheme (b) the land costs are estimated at 25% lower, or \$6,000,000.00. The dam costs for Scheme (a) are estimated at \$10,680,230.00, while for Scheme (b) the dam costs are estimated at \$7,954,900.00. The cost of the regulating-gate structure under Scheme (a) is estimated at \$1,405,300.00, while under Scheme (b) the amount is \$654,290.00. And so on throughout the various items of cost except as to spillway a far less expensive spillway is required for Scheme (a) than for Scheme (b). That

plans (a) and (b) were entirely different plans and wholly in conflict with each other as to nature, purposes and results is apparent from the estimated cost of the two schemes. A much greater acreage of land for the basin would be required for Scheme (a), being the multiple purpose project, demonstrating that the site used for one purpose could not be used for the other.

Point IV.

Congress is plainly without constitutional authority to authorize the forcible invasion and destruction of Appellant's Quasi Sovereign rights, the taking of its domain or own fast lands, roads and bridges for the construction of the water power feature of the Denison Reservoir project.

The full and utmost extent of the constitutional power of the United States with respect to non-navigable waters and the development of waterpower is clearly set forth in the following decisions of this court:

A. Power over water of non-navigable streams.

United States v. Rio Grande Dam & Irrigation Co., et al., 174 U. S. 690, 709;

Leovy v. United States, 177 U. S. 621, 633;

Kansas v. Colorado, 206 U. S. 46, 93;

United States v. Doughton, 62 Fed. (2d) 936, 938;

United States v. Appalachian Electric Power Co., --- U. S. p. ---, 85 L. Ed. p. 201.

B. Power with respect to water power development.

Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Company, 142 U. S. 254, 273;

United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 73;

United States v. River Rouge Improvement Co., 269 U. S. 411, 419;

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 340;

United States v. Appalachian Electric Power Co., --- U. S. p. ---; 85 L. Ed. p. 201.

We understand the teachings of the above cases to be that waterpower must come "into being in the operation of works constructed in the exercise of some power delegated to the United States." (*Ashwander Case* cited above). In order that waterpower may constitutionally "come into being" it must be as a result of the exercise of some constitutional power possessed by the United States incidental to and produced by works constructed for navigation or flood control on a navigable water; and those works must be reasonably appropriate for and have a real and substantial relation to either the improvement of navigation or flood control or some other constitutional power of the United States. In the *Appalachian Case* the court was careful to point out that:

"Waterpower development from dams in navigable streams is, from the public standpoint; a by-product of the general use of the rivers for commerce."

In the *Appalachian Case* this court condemns the attempt to escape limitations upon constitutional authority by consideration of "economic feasibility" by designating, as the Authorization Act does with respect to the Denison Reservoir, the project as a multiple purpose one. In that case this court, after pointing out that as to navi-

nable waters the power of the United States is not limited to "control for navigation," says:

"As respondent soundly argues, the United States cannot, by calling a product of its own 'a multiple purpose dam' give to itself additional powers."

That the power of Congress as to "Multiple purpose dams" is limited to navigable waters is clearly pointed out by the reference in the *Appalachian Case* to the decision in *Kansas v. Colorado*, (206 U. S. 46, 85-86). We do not understand the decisions of this court in the TVA or *Appalachian Cases* to mean that the United States may go beyond and outside of its constitutional powers to regulate commerce in the improvement of navigable waters and authorize, as against appellant's consent, the taking of its domain and the invasion and destruction of its quasi sovereign and proprietary rights for the construction of a flood control and power project on a non-navigable stream where, as here, such purposes are functionally separate and neither the incidental result of the other. It seems clear to us from the decisions of this court that there must, first, be a constitutional structure and, second, if as a result of the construction of such there is necessarily and incidentally produced a surplus of water the excess may be used for waterpower. Here, as the complaint sets forth and as the statutory scheme and Authorization Act clearly provide, the waterpower feature of the Denison project is both functionally and physically separate from the flood control feature and is wholly unrelated thereto; and if built requires much more of appellant's domain than would be required for a project for flood control. If the argument is made that Congress may, under the interstate commerce or some other power, authorize the construc-

tion of a flood control project at the Denison site*, ~~(foot note attached)~~, and superimpose the flood control structure upon another for waterpower, our answer is that the two being functionally separate and physically unrelated renders the whole Act void. By way of illustration it would be quite as reasonable to contend that since Congress has the constitutional authority to authorize the building of a Post Office that it could, in order to make the building self-liquidating, use the first story for a textile mill and extend the walls sufficiently above the textile mill to provide for the Post Office. Such asserted power would enlarge the powers of Congress far beyond those authorized by the Constitution.

In the argument of this case in the court below, much reliance was placed by counsel for appellees on the case of *Arizona v. California*, 283 U. S. 423, especially in view of Section 4 of the Act of October 17, 1940. We understand the holding of that case to be that a constitutional project or structure is not rendered invalid because incidentally it serves another purpose which may be outside the field of federal power. We also understand the law to be equally clear that this rule applies only; (a) where the constitutional objective is the primary purpose; and (b) where there has been no enlargement of the project or structure beyond the scope of the constitutional objectives in order to achieve an extra constitutional purpose, and (c) where there has been no authorization of additional structures outside the constitutional objective related to it only by the circumstances

*While we do not believe the court need reach this question, we would contend that the Federal Government is without constitutional authority to forcibly and against the State's consent invade and destroy its quasi sovereign, proprietary and other rights to construct a flood control project at the point in question, which project as is shown by the statutory scheme, is primarily, if not solely, for the protection of private property. Congress, by appropriating funds to cooperate with the State or its agencies could constitutionally accomplish such purpose.

of embodiment in a single statutory scheme, and (d) where the non-federal purpose is merely the incidental result of the construction and operation of a constitutional federal structure. This, in effect, was the holding in the *Ashwander Case* and in the case of *Arizona v. California*. This court in the last mentioned case took judicial knowledge that a large part of the Colorado River was formerly navigable and in the footnote the court said:

“The navigability extended as far north as the mouth of the Virgin River and Black Canyon.”

The Denison Dam is to be located some 750 miles from the mouth of Red River which river was held by this court in the case of *Oklahoma v. Texas*, to be non-navigable throughout its reach in Oklahoma, some 200 miles east of the proposed dam. The complaint definitely alleges that Red River is not a navigable stream throughout Oklahoma and that its navigability has remained unaffected since the decision of this court so adjudging in the case of *Oklahoma v. Texas*. The report of the engineers in House Document 541 shows that only a limited stretch of the river east of the Oklahoma line is now or has ever been a navigable water.

Point V.

The Denison Project cannot be sustained under the Interstate Commerce power.

It is only navigable waters which “are subject to national planning and control in the broad regulation of commerce granted the Federal Government.” *United States v. Appalachian Electric Power Company*. It cannot be soundly argued that the multiple purpose of the Denison project situated on a non-navigable water, shown

to be functionally and physically separate and unrelated can be sustained under the interstate commerce power.

Under the doctrine of the *Appalachian* case, the power of Congress over commerce "is not to be hampered because of the necessity for reasonable improvements to make an interstate waterway available for traffic." However, the purposes of Congress in authorizing the Denison project as we have shown were for two primary purposes, namely, flood control and waterpower. While reference is made in House Document 541 to the project's indirect and inconsequential benefit to commerce, it is clearly apparent that it was not under the commerce power that Congress attempted to authorize it. This statement is fully supported by the report of General Schley (p. 3, H. D. 541).

This report of the Chief of Engineers adopted by Congress makes very apposite the following language of this court in the *Appalachian Case*:

"The District Court is quite right in saying there are obvious limits to such improvements as affecting navigability. These limits are necessarily a matter of degree. There must be a balance between cost and need at a time when the improvements would be useful."

In so far as this project would have any effect upon navigation improvements, it will be noted that the estimated costs are reported by the Chief of Engineers to be "far in excess of the probable benefits." The indirect and inconsequential effects of the project upon interstate commerce would be the result of the flood control feature of the project and not the power feature thereof. The complaint as amended is definite in the allegation that the project would have no appreciable effect either for the purpose of improving navigation or regulating the

flow of Red River, and that said project would not in any way protect or improve the navigable portions of the lower reaches of Red River or of the Mississippi River either by enriching the low water flow of said rivers as the incidental result of the operation of said flood control and hydroelectric power projects except in the intangible, indirect and inconsequential way set forth and described in the report of the engineers which was adopted by Congress. Record, pp. 17-18. This court, in the Appalachian case, in approving the opinion of the District Court as to "obvious limits to such improvements as affecting navigability," makes pertinent the language of the District Court's opinion (23 Fed. Suppl. 83, 91), wherein the court said:

"* * * the fact that any river may in any portion in its course be navigable and subject to such control as the United States may have over navigable waters, does not invest every tributary of such river with the same status. To hold otherwise would be to extend the status of a navigable water, with all the consequences thereof, to the remote sources of the tributary streams, the mountain brooks, and spring branches which are the ultimate sources of so many of our great rivers."

The attention of the court is here directed to the map of the Denison project basin attached as an exhibit to the complaint. Record, p. 14A. This map shows that the lower reaches of the Washita River Valley, which river is wholly an Oklahoma stream and no part of which was ever navigable, is to be inundated for many miles upstream thereby inundating a very extensive oil field and destroying many subdivisions of appellant's government.

No government buildings, lands or other property are involved. Only private property is to be protected

by the flood control feature of the project. The statutory scheme sets forth that the project, neither the flood control feature nor the power feature, has ^{any} ~~as~~ substantial relation to either interstate commerce itself or an instrumentality of that commerce. It must be admitted that *neither* the floods or waters which flow down the Washita River and Red River at the point in question or west or above the dam, or for many miles east or below the dam, are used or capable of being used as an instrumentality of interstate commerce. It must also be admitted that the private property to be protected in four States, Oklahoma, Texas, Arkansas and Louisiana, does not of itself constitute interstate commerce:

The generation of electric power constitutes no part of interstate commerce.

Utah Power & Light Co. v. Pfof, 286 U. S. 165, 179, 182;

South Carolina Power Co. v. South Carolina Tax Commission, 52 F.2d 515, 524; Affirmed 286 U. S. 525.

"Commerce succeeds to manufacture and is not a part of it."

Cornell v. Coyne, 192 U. S. 418, 428, 429.

To hold that this project as authorized and as appellees are executing the same, has a direct and substantial relation to the interstate commerce power of Congress would, in effect, be to hold as was expressed by this court in the case of *Schechter v. U. S.*, 295 U. S. 495, 546, that the "federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the Federal Government."

See also *National Labor Relations Board v. Jones and Laughlin Corporation*, 301 U. S. 1, 30.

Point VI.

The Denison Project as the same is being applied by Appellees and in so far as authority is claimed for the taking and destruction of Appellant's Quasi Sovereign, proprietary and boundary rights, cannot be sustained under the general welfare clause.

United States v. Butler, 297 U. S. 1;
Carter v. Carter Coal Company, 298 U. S. 238,
 296;
Kansas Gas & Electric Co., v. City of Independence, 79 F.2d 638;
Greenwood County v. Duke Power Company, 81
 F.2d 986.

It cannot be soundly argued that since the general welfare clause grants Congress the power to spend money for the general welfare, that such power is to be extended by implication into an independent grant of power instead of as was held in the above authorities, a limitation on the taxing power. The above cases are clear and unmistakable in the holding that no substantive grant of authority is conferred by the general welfare clause. These cases point out that the power granted is to levy taxes which tax money, when collected, may be expended in the discretion of Congress for the general welfare. If the general welfare clause is construed to be a substantive grant of authority, the power of Congress is unlimited and the remainder of the Constitution is largely surplusage.

Under such a construction the States would be reduced "to little more than geographical subdivisions of the National domain." (*Carter v. Carter Coal Company*).

"To construe the provision respecting taxation as authorizing any federal governmental action involving the expenditure of tax moneys, or any federal

legislation, that would promote the general welfare, would in effect make the general welfare clause therein a general grant of power, and would open the door to wide encroachment on the reserved powers of the States."

(*Kansas Gas & Electric Company v. City of Independence.*)

Point VII.

The Denison Project as authorized by Congress, and as the same is being applied by appellees, is in contravention of the Tenth Amendment of the Constitution of the United States and the restrictions implicit in our dual form of government.

A. Plaintiff would lose jurisdiction over, and its subdivisions of government would lose the right to tax the land to be taken.

United States v. Unzenta, 281 U. S. 138, 142;
Bowen v. Johnston, 306 U. S. 19, 23, 28.

B. The boundary of appellant would be obliterated for 40 miles, its quasi sovereign rights destroyed, its area forcibly reduced contrary to the holdings of this court in the following cases:

City of New York v. Miln, 11 Peters, 102, 138;
Rhode Island v. Massachusetts 12 Peters, 657, 733;
Texas v. White, 7 Wall. 700, 721, 725;
Ashton v. Cameron Water Improvement District, 298 U. S. 513, 531;
Hopkins Federal Savings & Loan Ass'n v. Cleary, 296 U. S. 315;
Carter v. Carter Coal Company, 298 U. S. 238, 295.

The complaint alleges the invasion and destruction by appellees of rights and powers essential to appellant's quasi sovereign existence. The acts of appellees, unless restrained, require a surrender by appellant of "restrictions implicit in our federal form of government." *Charles C. Steward Machine Co., v. Davis*, 301 U. S. 548, 585.

C. Appellant has a well defined statutory program for the conservation of its waters and water resources with which the Denison project directly conflicts.

The pertinent portions of the Oklahoma statutes with respect to its waters and water resources are attached as Appendix three. It will be seen from an examination of the statutory laws of appellant that it has enacted adequate laws and set in operation adequate agencies for the conservation of its natural resources including the waters of its streams, its soil and the promotion of moisture. This program is declared a public necessity for the preservation of the habitability, productivity, health, comfort, sanitation, convenience and public utility of the State of Oklahoma and the people thereof.* By virtue of said statutes appellant has created its Planning and Resources Board to promote the control of floods within the State and to promote the conservation and use of its waters. Said Board has express authority to grant permission to develop available waterpower and to negotiate contracts with the Federal Government or any department thereof, or with any State, for the purpose of obtaining assistance and cooperation in the accomplishments of the purposes of flood control and water conservancy and use in the State. The appellee, Atkinson Company, in constructing the dam across Red River within the State of Oklahoma as a flood control and hydroelectric project, is acting without

*Section 2, Article 3, Chap. 7, Oklahoma Session Laws 1935, copied in Appendix.

the permission, consent or approval of appellant and contrary to appellant's plan for the conservation and development of the waters of the Washita River and Red River. Appellant is a semi-arid State and has adopted laws relating to the appropriation and use of water similar to those adopted by the arid States further west. Because appellant is a semi-arid State it stresses the importance of retaining and justifying its rights to regulate and control the use of its waters, which rights are attempted to be violated by the acts of appellees. Of particular importance in this connection, appellant has expended a considerable sum of money in making surveys of the Washita and Red Rivers, and in formulating a comprehensive plan for the conservation and development of the waters of said streams.

On March 18, 1936, in Cause No. 15,484, in the District Court of Grady County, the court decreed all territory on both sides of the Washita River, which includes counties and parts of counties lying in the watershed of the Washita River composed of the counties of Carter, Marshall, Johnston and Bryan, and other counties of Oklahoma, to be and constitute the Washita Soil and Water Conservancy District No. 1. This was done in compliance with the State statute, and the work is going forward. The acts and threatened acts of appellees, unless restrained, will nullify and set at naught the declared public policy of appellant, and such acts are, as appellant believes and alleges, in derogation of powers rightfully belonging and reserved to it. It is insisted here that the power or right to regulate and control the flood waters of the State, including the Washita and Red Rivers, and to develop the water resources thereof, said streams being non-navigable are not powers delegated to the Federal Government by the Constitution of the United States. Consequently, ap-

pellees have no authority to do the acts complained of and such acts constitute a direct invasion of the quasi sovereign rights of appellant to regulate its internal affairs.

Point VIII.

Since the statutory scheme purposefully, inseverably and inextricably unites two functionally separate and independent projects, one being for the generation of water-power, clearly beyond the power of Congress to enact, the whole Act falls.

Howard v. Illinois, et al., R. R. Company, 207 U. S. 463, 501;
Williams v. Standard Oil Company, 278 U. S. 235, 241.

The above cases announce the rule uniformly applied by this court. We have shown in the preceding portions of this brief that Congress, in authorizing the Denison project, purposefully authorized the same for two unrelated purposes neither being the incidental result of the other. The purpose of Congress in thus authorizing the project was as is stated in the report of the engineers and the report of the House Committee on flood control, to give the project some semblance of economic feasibility. Under such circumstances it must be admitted, we believe, that "the presumption is that Congress intended the Act 'to be effective as an entirety' ". (*Williams v. Standard Oil Company.*)

Point IX.

The declaration by Congress that this project is for the purpose of improving navigation, regulating the flow of Red River, controlling floods and other beneficial uses is not binding on the Courts and does not preclude a judicial inquiry as to the facts.

Section 4 of the Flood Control Act of June 28, 1938, (52 Stats. 1215) shown as Appendix one, provides in substance that the works and improvement therein authorized are "for the benefit of navigation and the control of destructive flood waters and other purposes."

Section 4 of H. R. 9972, 75th Congress, 3rd Session, approved on October 17, 1940, provides, in substance, that the project for the Denison reservoir "is hereby declared to be for the purpose of improving navigation, regulating the flow of Red River, controlling floods and for other beneficial uses."

The trial court was of the opinion that Section 4 of the Act of October 17, 1940, is in no substantial particular different from that of Section 4 of the Act of June 28, 1938. "It is merely a bit more specific. * * * In substance they mean the same."

The court below was of the opinion that it could not "go behind the express purpose of an Act of Congress and say that it was not enacted for that purpose as long as the means provided are not unrelated to the express objects of the legislation."

The complaint as amended specifically challenged the declared purposes of Congress with respect to this project for lack of factual bases. In so far as Section 4 of the 1938 Act is concerned, the same is general in its nature and could not, we believe, be held to apply to the

Denison project since such project was covered by an independent and unrelated portion of the Act.

The recommendations of the engineers (H. D. 541) refer to no other project and recommend the Denison project for two purposes, namely, flood control and water-power. The designated purposes and designated structural and functional characteristics of the scheme are clearly set forth. "Specific terms prevail over the general in the same or other statutes which might be otherwise controlling."

Ginsburg v. Popkin, 285 U. S. 204, 208;
Connecticut Railway & Lighting Co., v. Palmer,
 304 U. S. 493;
Kepner v. United States, 195 U. S. 100.

Section 4 of the Act of October 17, 1940, relates specifically to the Denison project. To say that Congress can declare a project to be within its power and by legislative fiat proclude any inquiry would destroy the constitutional functions of the courts.

Mugler v. Kansas, 123 U. S. 623, 661;
Cherokee Nation v. Southern Kansas Ry. Co.,
 135 U. S. 641;
Minnesota v. Barber, 136 U. S. 313, 319;
Mountain Timber Company v. Washington, 243,
 U. S. 218, 237;
United States v. Constantine, 296 U. S. 287,
 294;
St. Joseph Stock Yards v. United States, 298
 U. S. 38, 51.

Where a question of federal authority arises, navigability is a constitutional fact.

United States v. Cress, 243 U. S. 316, 322;

Crowell v. Benson, 285 U. S. 22, 55.

We, therefore, submit that Congress may not, under the interstate commerce clause, or any other power, declare this project to be in aid of navigation, or any other federal purpose, and thereby preclude a judicial inquiry as to the facts.

Point X.

The Motion to Dismiss which was sustained by the Trial Court admits all facts well pleaded.

Polk Company v. Glover, 305 U. S. 5, 9.

Point XI.

Power to condemn property exists only for public use, and a purpose outside of the constitutional power of Congress is not a public use.

Madisonville Traction Company v. St. Bernard Mining Company, 196 U. S. 239, 251.
United States v. Gettysburg Electric Railway,
 160 U. S. 668, 680.

In the case of *Hairston v. D. & W. Railroad Company*, 208 U. S. 599, 606, this court said:

"The courts of the states, whenever the question has been presented to them for decision, have, without exception held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. * * *

The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question."

Federal courts will determine for themselves quite apart from any legislative declaration, whether the purpose for which Congress has in form authorized condemnation proceedings, is within the Constitutional power of the United States. Thus in *Cherokee Nation v. Kansas Ry. Co.*, 135 U. S. 641, 657, this Court said:

"It is not necessary that an Act of Congress should express, in words, the purpose for which it was passed. The court will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution."

CONCLUSION

Counsel believe that the complaint states a cause of action entitling appellant to relief, and that it was error for the trial court to sustain the motion to dismiss and enter its order denying the injunction and dismissing the complaint.

This case presents questions which go to the very existence of our federal system of government. If Congress can constitutionally authorize the taking of approximately 100,000 acres of appellant's domain, destroy its quasi sovereign rights including more than thirty of its subdivisions of government under the guise of exercising some constitutional power, there could not well be left any power or right of appellant which Congress could not invade and destroy. If Congress can constitutionally authorize the taking of 100,000 acres of appellant's domain, with the attendant consequences alleged in the complaint, it could authorize the taking of one million acres, or as to that the whole State, and wholly destroy appellant as one of the United States. The application of the Act of Congress authorizing the Denison project strikes at vital

prerogatives of appellant and attempts to authorize an invasion of its rights which have heretofore been thought beyond the power of the National Government. It would be hard to conceive of an act calling for a more direct surrender of the powers essential to appellant's quasi sovereign existence.

Respectfully submitted,

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APPENDIX ONE

Pertinent provisions of the Act of June 28, 1938, c. 795, 52 Stat. 1215, are as follows:

SEC. 4. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated: *Provided*, That penstocks or other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam herein authorized when approved by the Secretary of War upon the recommendation of the Chief of Engineers and of the Federal Power Commission.

. . .

The Denison Reservoir on Red River in Texas and Oklahoma for flood control and other purposes as described in House Document Numbered 541, Seventy-fifth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable, is adopted and authorized at an estimated cost of \$54,000,000 . . .

. . .

The Government of the United States acknowledges the right of the States of Oklahoma and Texas to continue to exercise all existing proprietary or other rights of supervision of and jurisdiction over the waters of all tributaries of Red River within their borders above Denison Dam site and above said dam, if and when constructed in the same manner and to the same extent as is now or may hereafter be provided by the laws of said states, respectively, and all of said laws as they now exist or as same may be hereafter amended or

enacted and all rights thereunder, including the rights to impound or authorize the retardation or impounding thereof for flood control above the said Denison Dam and to divert the same for municipal purposes, domestic uses, and for irrigation, power generation, and other beneficial uses, shall be and remain unaffected by or as a result hereof. All such rights are hereby saved and reserved for and to the said States and the people and the municipalities thereof, and the impounding of any such waters for any and all beneficial uses by said States or under their authority may be as freely done after the passage hereof as the same may now be done.

APPENDIX TWO**APPENDIX H TO HOUSE DOCUMENT 541.**

The pertinent portions of Appendix H, referred to but not printed in House Document No. 541, are as follows:

III. Flood Damage.

1. *Introduction.*—The principal loss caused by floods in the Red River valley is that to crops. The usual flood occurs late enough in the season to prevent a new crop of cotton from maturing and for other crops, on the average, not more than half a crop can be harvested after a flood. Some loss of this kind as well as bank caving and various intangible losses occur even with minor floods. If the so-called "project" flood or maximum probable flood were to occur under present conditions the loss would be enormous. Bridges would be washed out, levee districts and towns inundated, and much property damage done. The following paragraphs describe the estimates of the monetary value of these losses.

2. *Crop losses.*—In determining the average crop production per acre, actual figures were obtained from the County Agents of Lamar, Red River, and Bowie Counties, Texas; McCurtain County, Oklahoma and Little River and Miller Counties, Arkansas. The figures were compiled from representative farms in each county and pertained only to land lying in the alluvial valley. In addition to these statistics, numerous representative farmers operating in Texas, Oklahoma, Arkansas, and Louisiana were interviewed and figures were obtained which showed the actual production. These records showed the average productions to be as follows:

Cotton, 200 pounds per acre above Index.
Cotton, 250 pounds per acre below Index.

Corn, 30 bushels per acre, entire valley.
Mixed hay, 1 ton per acre, entire valley.
Vegetables, variable.

As it was impracticable to use every individual item in compiling this estimate, only the major crops were considered, and only two headings were used for them, namely: "Cotton" and "Other Crops." However, as "Cotton Seed" represented a major item by itself, there being approximately one-half ton of seed to a bale of cotton, it was decided to assign it a separate heading.

Crop acreage figures, furnished by the various County Agents in the three states affected, indicate that 60 per cent of the cultivated area between Denison and Index is normally planted in cotton, the remaining 40 per cent being in other crops. For the area between Index and Alexandria the percentage are 70 per cent and 30 per cent, respectively. This additional 10 per cent in cotton crop for the lower valley is explained by the fact that the levees offer protection which makes an increase in the major crop profitable.

The price used for cotton was arrived at thus: After the war, cotton was selling for around fifteen to eighteen cents per pound. However, during the depression years, cotton sold as low as four and five cents per pound. As neither the high nor low prices were representative of normal years, a price of thirteen cents per pound was assumed to be a fair figure.

As the five to six-dollar per bale cost of ginning was not included in the charges against cotton production, and as the farmer usually pays the ginner for the cost of ginning with cottonseed, this expense was deducted from the seed value.

In 1936, cottonseed sold for thirty-four to thirty-five dollars per ton. In March 1937 it was selling for forty dollars per ton, but during depression years it sold at a much

lower price. Thirty-two dollars per ton was selected as a conservative figure.

As the ratio of cotton seed to lint is 2 to 1, a 500 pound bale of cotton will produce 1,000 pounds of seed, or $\frac{1}{2}$ ton.

One-half ton of seed at \$32 less \$6 for ginning equals \$10, which is the net value used for the seed from one bale of cotton. This is equivalent to \$20 per ton of seed. The value of "Other Crops" per acre was determined as follows:

80 per cent of area in corn, wheat, oats, and rye,

@ \$25 per acre -----	\$20.00
1 per cent of area in vegetables, @ \$100 per acre --	1.00
4 per cent of area in alfalfa, @ \$80 per acre ----	3.25
15 per cent of area in mixed hay, @ \$12 per acre --	1.80
Total average per ac. "Other Crops"-----	\$26.00

As only one-half of the crop was assumed to be lost one-half of \$26, or \$13 per acre, was used.

Actual records at Denison cover a period of 30 years, 1906-1936, inclusive. During this period three floods occurred that would cause damage; namely, 1908, 1915, and 1935. As the 1915 flood had several peaks and a study of damage attributed to flow above Denison was very difficult to determine, it was assumed that it caused a damage equal to that of 1935. Therefore the annual damage by floods for the period of record was 1908 damage plus 1935 damage times two divided by 30.

The loss caused by the Project Flood assumed to occur once in the economic life of the Project, or once in fifty years, was divided by fifty in order to determine the annual loss.

The greater portion of the uncultivated area in the valley is used almost exclusively for pasturage. When inundated by floodwaters the timber is not damaged, but the grass is covered with silt, making it necessary to feed

the livestock for an indefinite period; low places are left full of water, which at times require months to dry up; and large quantities of drift are deposited which must be cleaned up. It is difficult to place an exact amount on these damages, but the various studies indicate that annual benefit of 4 cents per acre is a fair figure.

A summary of the computations of average annual crop loss is given in Table No. 1.

3. *Flood damage other than crops.*—The project flood is of such nature and size that if it is allowed to go down the river uncontrolled it will cause enormous damage to all that lies in its path. The 1908 flood uncontrolled would also cause damage, but to a much lesser degree since many structures and improvements have been built with the 1908 high-water elevations as a guide.

The following flood-damage figures are in most cases only for the Project Flood which was considered to occur once in 50 years. Where similar damage to a lesser degree occurs for the other floods studied it is incorporated and the amount noted as such.

4. *Business buildings (buildings and merchandise).*—The business section of Alexandria would be covered by seventeen feet of water and it is located so that there would be a strong current through it. Also a number of small towns would be inundated. The probable loss to buildings and merchandise was estimated at \$1,200,000.

Annual ----- \$24,000

5. *Residence buildings (buildings and contents).*—This loss was divided into city and rural section as noted below. Cities

Shreveport, 50% inundated.

Alexandria, 100% inundated.

Fulton, Garland, Coushatta, Bossier City, Colfax, and small towns inundated.

Population

Shreveport, 50% -----	40,000
Alexandria -----	24,000
Other small towns -----	16,000
	<hr/>
	80,000

80,000 ÷ 5 = 16,000 homes at \$125 damage to building and \$75 damage to furniture ----- \$3,200,000

Barksdale Field, Louisiana ----- 100,000

Farms:

560,000 acres, one building to 40 acres, 14,000 buildings at \$50 ----- 700,000

\$4,000,000

Annual ----- 80,000

6. *Factories and municipal plants.*—Shreveport has a number of manufacturing plants that would come within the area flooded. Lumberyards and mills would be inundated at Alexandria. Damage to buildings, equipment, and materials was estimated at \$1,000,000. Annual \$20,000.

One-half of the streets of Shreveport, all of the streets of Alexandria, and a number of small towns along the river would be inundated. No damage was estimated for streets other than pavement. It was estimated that 90 miles of pavement would be damaged in the amount of \$5,000 per mile, or a total of \$450,000. Annual \$9,000.

7. *Sewers.*—Sewer systems in Shreveport, Alexandria and Bossier City would be affected by the high water. The amount of damage was placed at \$150,000. Annual \$3,000.

8. *Highways.*—Between Fulton, Arkansas, and Alexandria, Louisiana, there is approximately 500 miles of paved or improved road that parallels or is adjacent to the Red River and is subject to overflow. Also there is ap-

Table No. 1.—Average annual crop dam

Flood designation	Peak Discharge at Denison c.f.s.	Above Index	
		Cleared Acres Flooded	Cleared Acres Protec
Project:			
Natural -----	1,245,000	263,468	-----
Modified -----	210,000	153,163	110,3
1908:			
Natural -----	471,000	233,468	-----
Modified -----	55,000	15,316	218,1
1936:			
Natural -----	186,000	153,163	-----
Modified -----	55,000	15,316	137,8

Annual Crop Damage			
Project Floods:			60%
Total damage -----	\$17,222,770		
Annual damage 1/50 -----		\$ 344,455	
Damage in 30 years:			40%
1908 -----	10,455,352		
1935 x 2 -----	8,512,630		
Total -----	\$18,967,982		
Annual 1/30 -----		632,266	
Wooded land, 770,350 acres @ 4c --		30,814	
Total annual crop damage		\$1,007,535	

reservoir on Red River at Denison, Texas.

Flow Index

Denison-Alexandria

	Cleared Acres Flooded	Cleared Acres Protected	Total Value of Protection	Total Protection
76	658,748 172,390	486,358	\$14,663,694	\$17,222,770
26	326,353 147,440	178,913	5,394,226	10,455,352
50	172,390 137,290	35,100	1,058,265	4,256,315

Average values per acre

Average crop values per acre

of cotton:		70% of area in cotton:	
200	\$15.60	250 lbs. @ 13c	\$22.75
Cottonseed	2.40	Cottonseed \$5 per acre	3.50
Other crops:		30% of area in other crops:	
50% loss	5.20	\$26 per acre & 50% loss	3.90
Average value per acre	\$23.20	Average crop value per acre	\$30.15

proximately 12 miles of pavement crossing the alluvial valley at Fulton, Garland, and Shreveport. This pavement would be subject to rather heavy damage.

Fulton to Alexandria, 300 miles at \$2,500 -----	\$750,000
Crossings at Fulton, Garland, and Shreveport, 12 miles at \$10,000 -----	120,000
Total -----	\$870,000
Annual -----	17,400

9. *Bridges.*—Costs of construction of the bridges were used where available. In other cases weights of material in bridges were computed or estimated and the value of the bridge found by arriving at a unit price per foot of length of bridge.

Approaches to the bridges include embankment and pavement or track subject to overflow by project flood. It was assumed all bridges down to and including Index, Arkansas, would be destroyed.

Highway bridges:

Denison -----	\$200,000
Sowells Bluff (under construction) -----	300,000
Arthur City -----	120,000
Index -----	180,000
	\$800,000

Toll bridges at Telephone and Denison, Texas, including approaches -----

	\$120,000
--	-----------

Highway approaches, four @ \$40,000 -----	160,000
---	---------

Railway bridges:

Denison, M. K. T. -----	1,031 feet
Carpenters Bluff, K. O. and G. -----	1,100 feet
Arthur City, Frisco -----	858 feet
Index, K. C. S. -----	1,200 feet

4,189 feet at \$187 -----	\$ 783,000
Railroad approaches, four at \$30,000 -----	120,000

Miscellaneous:

Cost of temporary structures, railroad -----	\$250,000
Cost of temporary structures, highway -----	150,000

\$2,383,000

Annual -----	47,660
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10. *Railroads.*—The railroads would have heavy damage to track in the lower valley in addition to loss of bridges. A number of cars placed on bridges to weight them down would be lost, also freight in cars standing in yards would be damaged. This was estimated as follows:

Tract adjacent to river, 250 miles @ \$5,000 -----	\$1,250,000
Cars lost with bridges, 200 @ \$5,000 -----	1,000,000
Loss to freight in yards, 200 @ 1,000,000 lbs. capacity, 5c lb., or \$5,000 per car -----	1,000,000

Total -----	\$3,250,000
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Annual -----	65,000
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11. *Farm Machinery.*—River water covering farm machinery would cause material damage, especially equipment such as tractors, motors, etc.

Tractors, approximately 1 to 1,000 acres—500

at \$50 -----	\$25,000
---------------	----------

Machinery (mowing machines, binders, etc.) -----	5,000
--	-------

Miscellaneous (pumps, lighting units, etc.) -----	20,000
---	--------

Total -----	\$50,000
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Annual -----	1,000
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12. *Livestock.*—The project flood is of such magnitude that the majority of high points in the valley where

stock would naturally be gathered would be completely inundated. As this flood would come with very little warning, time would not permit the removal of this stock to safety. The 1908 Hypothetical Flood, in all probability, would not create such an enormous loss to livestock as the majority would be able to reach the various islands left in the overflow. The Project Flood, therefore, is the only one being considered.

Mules and horses (approximately 20,000 in the valley): 1,500 lost @ \$100 each -----	\$150,000
Cattle (approximately 50,000 in the valley): 10,000 lost @ \$40 each -----	400,000
Hogs (approximately 15,000 in the valley): 3,000 lost @ \$5 each -----	15,000
Sheep and goats (approximately 15,000 in the valley): 3,000 lost @ \$4 each -----	12,000
Chickens and turkeys (approximately 210,000 in the valley): 105,000 lost at 50c each -----	52,500
Total -----	\$629,500
Annual -----	12,500

13. *Relief (care of destitute).*—With the loss and destruction of practically the entire crop in the valley, an enormous number of farm tenants would be made entirely destitute. As the tenant population is composed almost entirely of Negro and poor white classification, they would, of a necessity, have to be placed on relief.

10,000 families for six months at \$10 per month --	\$600,000
Annual -----	12,000

14. *Ginning Losses.*—The average cost of ginning was assumed to be \$6 per bale. The loss is directly chargeable against the flood because a loss of cotton means a corresponding loss to the ginner, for, had the cotton crop been

made, he would have ginned it. The actual cost of fuel and damage to machinery, from ginning, was assumed to be \$1.50. This amount deducted from \$6.00 represents the anticipated loss per bale, or \$4.50.

Project Flood, 201,057 bales at \$4.50	\$905,757
Annual	18,095
30-year damages, 200,621 bales at \$4.50	902,795
Annual	30,093

15. *Loss to railroad companies (hauling cotton).—*

The various railroad companies operating in the vicinity of the Red River Valley anticipate a certain volume of business, each year, from this area, and consequently maintain the necessary facilities for handling it. In the event of a major flood, the crops are destroyed and the railroad loses the entire transportation. As Texarkana, Texas-Arkansas, is located approximately midway between Denison and Alexandria, it was assumed that the freight rate from there to the various destinations, particularly New Orleans, Louisiana, or Galveston, Texas would be representative.

Project Flood:

Cotton 201,057 bales at \$1.55 per bale	\$ 311,638
Cottonseed, 100,529 tons at \$7.20 per ton	723,809
Total	\$1,035,447
Annual	20,709

30-year damages:

Cotton, 200,621 bales at \$1.55 per bale	\$ 310,963
Cottonseed, 100,311 tons at \$7.20 per ton	722,239
Total	\$1,033,202
Annual	34,440

16. *Loss to railroad companies (rerouting trains).—*

The project flood would be of such magnitude that every railroad bridge which crosses Red River would be washed out to and including the one at Index, Arkansas. This condition would necessitate the rerouting of trains until such time as suitable crossings could be erected. It is assumed that the nearest available crossing is at Fulton, Arkansas.

Denison, M. K. T., 10 trains per day at 500 miles each -----	5,000
Carpenters Bluff, K. O. & G., 5 trains per day at 500 miles each -----	2,500
Arthur City, Frisco, 5 trains per day at 350 miles each -----	1,750
Index, K. C. S., 10 trains per day at 50 miles each -----	500
Total miles -----	9,750
9,750 train miles at \$3.15 per mile for 30 days -----	\$921,375
Annual -----	18,428

17. *Bank caving.*—Bank caving occurs when the river is above one-half bank full stage. From a study of levee practice in the lower river valley, a shift of one mile in thirty years is taken as an average. Regulation of the flow at Denison would probably affect the within-bank stage down to Fulton, Arkansas. Because of the inflow below Denison, the reservoir will only reduce bank caving by 30 per cent.

285 miles from Denison to Fulton.

$285 \times 640 \div 30 = 6,080$ acres average annual bank caving.

Reduction, $6,080 \times 30\% = 1,824$ acres at \$30 = \$54,720.

18. *Telephone and power lines.*—The Telephone, telegraph, and power lines within the valley would receive considerable damage on account of poles and wire being broken down.

500 miles at \$100, including exchanges and distributions in towns	\$ 50,000
Loss of business	150,000
Total	\$200,000
Annual	4,000

19. *Revetments, dikes, and retards.*—Channel stabilization for the protection of the bridges at Arthur City, Index, and Fulton would be damaged or destroyed. The damage is estimated at \$40,000; annual, \$800.

20. *Avulsions.*—The survey made by the U. S. Boundary Commission in compliance with orders issued by the U. S. Supreme Court in 1925, showed all cut-offs created by avulsions between Denison, Texas, and the Oklahoma-Arkansas state line between the years of 1844 and 1921. Using this record for a basis and extending the area to Index, Arkansas, damage was estimated at:

2,500 acres at \$15	\$37,500
Annual	750

21. *Malarial control.*—During the last few years the United States Government, cooperating with the various states and counties, has expended millions of dollars draining water holes, swamps, etc., in order to eradicate the mosquito for the purpose of controlling malaria fever. This work consists principally of digging ditches, which are silted full and consequently lost whenever a flood occurs.

20 miles ditch at \$750 per mile x 22 counties	\$330,000
Annual benefits	6,600

Authorities on the subject claim that better than 90% of the entire population living in the Red River Valley are infected with malaria. Aside from the pain, discomfort, and reduction in efficiency, a real monetary loss results from doctors' bills and the cost of medicine. It is estimated

that 9,000 persons should be annually relieved from the above expense at the rate of \$3.00 per capita.

22. *Enhanced property values.*—With the reservoir in operation a large amount of wooded land would be cleared and placed in cultivation. It is estimated that 30% of the timber land in the valley above Index, Arkansas, would be cleared almost immediately and thereby create an enhancement in the value of \$25 per acre.

136,000 x 30% x \$25	-----	\$1,020,000
Annual at 5%	-----	51,000

It is also estimated that approximately 40,000 acres of marginal cleared land would be made more productive with an enhancement in value of \$25 per acre.

40,000 x \$25	-----	\$1,000,000
Annual at 5%	-----	50,000

23. *Ferries.*—All ferries on Red River between Denison and Fulton would be washed out or damaged materially.

10 ferries at average loss of \$300 each	-----	\$3,000
Annual	-----	60

24. *Fences.*—Drift and washouts would destroy or damage a considerable amount of fence.

1,000 miles at \$50 per mile	-----	\$50,000
Annual	-----	1,000

25. *Intangible items.*—(a) Boll weevil. This insect hibernates in old cotton stalks, brush, and other refuse and prospers in wet places. Statistics indicate that the cotton crop suffers the most from boll weevil after a flood.

(b) Johnson Grass: After the farmers have expended thousands of dollars over a period of years to eliminate this nuisance, a flood will occur and deposit additional seed, making it necessary to start all over again.

(c) Nut Grass: When the seed of this grass has been deposited on a farm by an overflow, the land is virtually ruined, as it is practically impossible to kill it.

(d) Loss to General Business: The merchants in the small towns lying adjacent to the valley, as well as those in the cities, anticipate a large volume of business from the farmer. This business is materially reduced after a major flood.

(e) Diseases: After every disaster from floods the prevention of disease develops into a major problem. The bodies of dead animals, the pollution of wells, and the accumulation of filth all have a tendency to aggravate this condition.

(f) Regulated Flow: After the construction of the Denison Dam a regular flow will be maintained in the entire river. This regulation will eliminate the drying up of the stream bed at certain periods of the year; it will furnish permanent watering places for cattle throughout the valley, will supply sufficient water for irrigation purposes during drought years, and will reduce the pollution of the stream at the various sewerage disposal outlets.

(g) Benefits from Tourist: With the construction of the Denison Reservoir, various recreational facilities will be established bordering on and in the vicinity of the lake. Because of the comparatively short and mild winters, the climatic conditions are excellent. This condition will, naturally, have a tendency to induce tourists from every section of the country as well as thousands of people from nearby communities in both Texas and Oklahoma.

(h) Confidence of People: Under existing conditions in the valley, people with capital are unwilling to invest their money in developing or improving the land because of the uncertainty and frequency of the floods. Merchants are unwilling to furnish the farmer with more than a pit-

tance for the same reason. As a result of this condition, the development of the entire valley is retarded.

(i) Pipe Line Crossings: As the Red River flows through an oil and gas region, particularly in the Louisiana area, there are innumerable pipe lines crossing the river. The Project flood would undoubtedly destroy or damage all of these lines.

It is estimated that the total annual benefits for intangible items will amount to \$150,000.

The annual flood damages are summarized in Table No. 2, and the locations of areas protected are shown on Plate No. 1 of the main report.

Table No. 2.—Flood damages—Summary.

Item	Annual Damage
Cotton -----	\$701,417
Cottonseed -----	107,911
Other crops -----	167,393
Uncultivated land -----	30,814
1. Crops and uncultivated lands -----	\$1,007,535
2. Business buildings (buildings and merchandise) -----	\$ 24,000
3. Residence buildings (building and contents) -----	80,000
4. Factories and municipal plants -----	20,000
5. Streets -----	9,000
6. Sewers -----	3,000
7. Highways -----	17,400
8. Bridges -----	47,660
9. Railroads -----	65,000
10. Farm machinery -----	1,000
11. Livestock -----	12,590
12. Relief (Care of destitute) -----	12,000
13. Ginning losses -----	48,188

14.	Loss to railroad companies (hauling cotton)	55,149
15.	Loss to railroad companies (rerouting trains) -----	18,428
16.	Bank caving -----	54,720
17.	Telephone and power lines -----	4,000
18.	Revetments, dikes, and retards -----	800
19.	Avulsions -----	750
20.	Malarial control -----	33,600
21.	Enhanced property values -----	101,000
22.	Ferries -----	60
23.	Fences -----	1,000
	Subtotal -----	\$1,616,880
24.	Intangible items -----	150,000
	Grand total -----	\$1,766,880

APPENDIX THREE

Pertinent Provisions Oklahoma Statute for Conservation of Water Resources.

Article 5, Chapter 70, *Oklahoma Statutes* 1931, as amended by Article 3, Chapter 70, *Oklahoma Session Laws* 1935, and Article 17, Chapter 24, *Oklahoma Session Laws* 1937.

The Oklahoma Planning and Resources Board is the successor of the Conservation Commission of Oklahoma and the State Engineer of said State. Sections 2 and 3, Article 17, Chapter 24, *Oklahoma Session Laws* 1937, page 74.

Section 2 of Article 3, Chapter 70, *Oklahoma Session Laws* 1935, reads as follows:

"That the retention of rainfall and the capture and detention and distribution of flowing surface and subterranean water, and conservation of water, soil and promotion of moisture, in the State of Oklahoma, in any lawful, available and economical way and manner is hereby recognized and declared to be and is a public necessity for the preservation of the habitability, productivity, health, comfort, sanitation, convenience and public utility of the State of Oklahoma and the people thereof."

Section 6 of Article 3, Chapter 70, *Oklahoma Session Laws* 1935, provides in part as follows:

"The said Conservation Commission shall have and is hereby authorized to exercise the following additional powers, rights, privileges and functions, to those now possessed:

"(a) To control, store and preserve within the boundaries of the State, all waters in the State which may be stored within the State in any manner whatsoever, for any useful purpose, under the authority and control of said Commission, and to use, dispose

and sell the stored water within the boundaries of the State, except as to such waters duly appropriated to private, municipal or public use;

“(b) To control rivers, creeks, ponds and lakes, to prevent or aid in the prevention of, damage to person or property from such harmful waters within the State of Oklahoma; the Conservation Commission is authorized to adopt and apply the necessary methods and means to purify and render sanitary all waters impounded by or under its authority and also to prevent the contamination or pollution of any and all reservoirs, ponds, lakes, creeks, and rivers and to call upon the Attorney General to bring any suit or action by the Commission deemed necessary to effect this object; * * *”

Also see Section 7, Article 17, Chapter 24, *Oklahoma Session Laws 1937*, page 75.

Section 13243, *Oklahoma Statutes 1931*, referring to the powers of the Conservation Commission of the State of Oklahoma now exercised by the Oklahoma Planning and Resources Board, provides in part as follows:

“The said commission is hereby vested with the duties and powers necessary and proper to enable the commission to fully and carefully carry out the object of this Act and to promote the control of floods in the State and diminish their destruction and promote the conservation and use of water in the State to the protection of public and private property and to the development of agricultural and industrial development of the State and in addition thereto, shall have the following specific powers and duties:

* * * *

“(3) Investigate and determine upon the best methods of flood control and water conservation and use in the different sections of the State for the Agricultural and Industrial development of the State and as to the best method of construction and main-

tenance of necessary structures in the State to accomplish that purpose.

"(4) Aid at all times counties, cities and municipal corporations in the State in promoting and developing flood control and water conservation in the State.

"(5) The said Commission shall have authority to negotiate contracts with the Federal Government or any department or bureau thereof, or with any State in this Union for the purpose of obtaining assistance and cooperation in the accomplishment of the purpose of flood control and water conservancy and use in the State, and to that end may match funds with such government or other state upon such terms as shall be agreed upon and approved by the Governor of the State; with the limitation, that contracts with other states for the division and apportionment of the cost and use of the water controlled by interstate projects shall be submitted to and approved by the Legislature of the State and the Governor of the State, and Congress and the President of the United States conformable to the State and Federal Constitutions.

"(7) To supervise, conserve and develop the water power of the State of Oklahoma, granting permission for the development of such power, making such reasonable rules and regulations governing the development and operation and distribution of such power except as may be otherwise provided by law, and to take such steps as may be necessary to encourage the development of water power within said State, and to undertake by, and on behalf of the State the development of water power when private development may be inadequate or unsatisfactory on such terms as may be hereinafter provided by the Legislature, and to exercise such further pow-

ers and duties as may be directed hereafter by the Legislature of this State."

The first paragraph of Section 13273, *Oklahoma Statutes* 1931, referring to hydroelectric plants, provides:

"The right of the State in its natural resources is hereby declared to be paramount to their rights and after any plant shall have been constructed by a private enterprise the State may, by legislative enactment, revoke the license and take over and operate for, and on behalf of the State, such project or projects, but no such action shall be taken by the Legislature except on intervals of ten (10) years after the completion of any such project, and the owners of said project shall be reimbursed for their original investment, plus eight (8%) per cent. annum, on their investment less its net earnings."